Supreme Court, U.S.
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No. ___

IN THE

# Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2263; ROSE REED; and INEZ MARQUEZ,
*Petitioners*,

v.

THE UNITED STATES OF AMERICA; JAMES G. ROCHE, in his official capacity as Secretary of the Air Force; CHUGACH MANAGEMENT SERVICES, INC.; and CHUGACH MANAGEMENT SERVICES JOINT VENTURE,
*Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the preference for Native American contractors in §8014 of the Department of Defense Appropriations Act, which is neither restricted to Indian tribes nor is related to uniquely Indian interests, may nevertheless be upheld as a tribal preference subject to rational basis review under *Morton v. Mancari*, 417 U.S. 535 (1971) on the grounds that it could be applied to Indian tribes or members of Indian tribes?

Whether the preference for Native American contractors in §8014 of the Department of Defense Appropriations Act is narrowly tailored to serve a compelling interest and is consistent with the Equal Protection guarantee of the Fifth Amendment?

## PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding in the court of appeals.

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2263; ROSE REED; and INEZ MARQUEZ,
*Petitioners*,

v.

THE UNITED STATES OF AMERICA; JAMES G. ROCHE, in his official capacity as Secretary of the Air Force; CHUGACH MANAGEMENT SERVICES, INC.; and CHUGACH MANAGEMENT SERVICES JOINT VENTURE,
*Respondents*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR WRIT OF CERTIORARI

The American Federation American Federation of Government Employees, AFL-CIO, ("AFGE"), AFGE Local 2263, Rose Reed, and Inez Marquez, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a) is reported at 330 F.3d 513. The opinion of the district court (App., *infra*, 15a), granting summary judgment to

respondents, is reported at 195 F.Supp.2d 4. An opinion of the district court, denying defendants' motion to dismiss and plaintiffs' motion for preliminary injunction, is reported at 104 F.Supp.2d 58 (June 30, 2000).

## JURISDICTION

The judgment of the court of appeals was entered on June 6, 2003. This petition for a writ of certiorari was filed on September 4, 2003, within 90 days of the date of the entry of judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Defense Appropriations Act for FY 2000, § 8014, Pub. L. 106-79, provides, in pertinent part, that:

> None of the funds appropriated by this Act shall be available to convert to contractor performance an activity or function of the Department of Defense that, on or after the date of the enactment of this act, is performed by more than 10 Department of Defense civilian employees until a most efficient and cost-effective organization analysis is completed on such activity or function and certification of the analysis is made to the Committees on Appropriations of the House of Representatives and the Senate: *Provided,* That this section and subsections (a), (b) and (c) of 10 U.S.C. 2461[1] shall not apply to a commercial or industrial type

[1] 10 U.S.C. §2461(a) requires that the Secretary of Defense (1) notify Congress when undertaking to study a federal function performed by federal civilian employees for possible performance by a private contractor; (2) provide Congress a summary of the cost comparison between federal civilian and contractor performance showing that contractor performance will result in cost savings to the government; and (3) certify to

> function of the Department of Defense that (1) is included on the procurement list established pursuant to section 2 of the . . . Javits-Wagner-O'Day Act; (2) is planned to be converted to performance by a qualified non-profit agency for the blind or a qualified nonprofit agency for other severely handicapped individuals in accordance with that Act, or (3) is planned to be converted to performance by a qualified firm under 51 percent Native American ownership.

## STATEMENT OF THE CASE

### 1. Statement of Facts

The 377th Civil Engineering Group ("CEG") at Kirtland Air Force Base ("AFB") in Albuquerque, New Mexico, performed a variety of base maintenance functions, including interior electrical work, electronics, plumbing, painting, carpentry, HVAC (heating, ventilation and air conditioning), landscaping and grounds, metal shop, procurement and construction. On December 9, 1998, Kirtland AFB notified Congress of its intent to undertake an Office of Management and Budget ("OMB") Circular No. A-76 [2] cost comparison study of the 377th CEG, which was expected to impact 236

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Congress that the government's calculation of the in-house cost of performance is based upon the most-efficient and cost effective organization for performance by the federal workforce.

[2] OMB Circular A-76 establishes procedures for identifying the cost of the government's performance of commercial activities and comparing that to contractor performance. *OMB Circular No. A-76, §§1 and 5.* This cost-comparison process consists of six steps: (1) the development of a performance work statement ("PWS"); (2) a study to determine the government's Most Efficient Organization ("MEO"); (3) the development of an in-house Government cost estimate; (4) issuance of the Request for Proposals or Invitation for Bids; (5) the comparison of the in-house bid against a proposed contract; and (6) the administrative appeals process. *OMB Circular A-76 Revised Supplemental Handbook, Ch.3(A)(3).* A commercial contractor must beat the in-house bid by 10% in order to be awarded the contract. *Id.*

civilian positions. But shortly after initiating the team effort to develop the "most efficient organization," which comprises the basis of the government's bid to retain the work in-house, Kirtland abruptly suspended the A-76 study when certain Alaska Native firms responded to an A-76 notice by directing Kirtland's attention to the § 8014 preference. Specifically, Chugach Alaska Corporation, responding from its corporate office in Arlington, Virginia, touted its "very special preference status enacted in the Legislation" as being "of considerable benefit" to Air Force officials, who could thereby contract the work directly to Chugach without undertaking the often lengthy process of competing the work between in-house and contractor performance.

Thereafter, Kirtland AFB sought and obtained approval to forego the A-76 study and directly convert the work performed by the employees in the 377th CEG to a Native American contractor under § 8014. Kirtland then subsequently awarded a contract for the performance of the Civil Engineering (CE) functions to Chugach Management Services, Joint Venture on July 14, 2000. The contract covers a base period of one year with nine one-year options to renew and has an award value of $523,000,000 not including an additional award fee pool worth approximately $16,666,350.00. Upon the direct conversion of its work to Chugach Management Services, Joint Venture, the 377th CEG was inactivated. Approximately 242 federal CE positions were eliminated as a result, including those occupied by petitioners Inez Marquez and Rose Reed and other federal employees within the bargaining unit represented by AFGE.

Chugach Management Services, Joint Venture is a partnership between Chugach Management Services Inc. ("CMSI") and Alutiiq Management Services, LLC ("Alutiiq LLC") CMSI was originally incorporated under the Alaska Corporations Code as Chugach Engineering Services, Inc. Its Articles of Incorporation define its corporate purpose as

providing engineering services and engaging in any lawful business or endeavor permitted under the laws of the State of Alaska. They do not require that CMSI's powers or activities conform to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.* CMSI is authorized to issue 100,000 shares of common stock without restriction. Membership on CMSI's Board of Directors is not restricted to shareholders or to individuals who are Alaskan Natives. Dusty Kaser, acting president of Chugach Alaska Corporation during the time that the Kirtland contract was under consideration, became the Chief Executive Officer of Alutiiq LLC in January 2000. Richard Hobbs, CMSI's contracting agent on the Kirtland contract, became the Chief Operating Officer for Alutiiq LLC in September 2000. Neither Kaser nor Hobbs is an Alaska Native. At the time that the Kirtland contract was awarded, the corporate office of Alutiiq LLC was staffed by five or six individuals none of whom, to the knowledge of its Chief Operating Officer, was Alaskan Native.

**2. Proceedings Below**

On May 1, 2000, petitioners filed a complaint in the United States District Court for the District of Columbia seeking an order declaring that the Native-American exemption in § 8014 violated the equal protection guarantee of the Fifth Amendment and enjoining the Department of Air Force from awarding a contract or renewing any existing contracts authorized under that statutory race-based preference. On May 3, 2000, the district court granted a motion filed by Chugach Management Services, Inc. and Chugach Management Services Joint Venture to intervene in the matter.

In a memorandum opinion issued on June 30, 2000, supplemented by an order dated July 5, 2000, the court denied plaintiffs' request for preliminary relief and dismissed claims brought by AFGE Local 153 challenging a similar §8014 direct conversion at MacDill Air Force Base. Upon the close

of discovery, the parties submitted cross motions for summary judgment. On March 29, 2002, the district court issued an order finding that the individual and AFGE plaintiffs had standing to bring their claims, but, otherwise denying plaintiffs' motion for summary judgment and granting defendants' and intervenor-defendants' motions for summary judgment. On April 25, 2002, plaintiffs filed a timely notice of appeal. On June 6, 2003, the United States Court of Appeals for the D.C. Circuit issued an opinion affirming the decision of the district court. This Petition for *Writ of Certiorari* follows.

## REASONS FOR GRANTING THE PETITION

The Defense Department Appropriations Act grants a preference to Native American contractors that is defined in racial terms. The words of the statute state the preference in racial terms. And, the court below, declining the government's suggestion that the preference be more narrowly construed, read the Act as creating a racial preference. (App. 7a-8a) Racial preferences in government contracting are subject to strict scrutiny and may be sustained only if they are narrowly tailored to serve a compelling interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

The court below declined to subject the Native American preference in the Defense Appropriations Act to strict scrutiny and, instead, applied the more lenient rational basis test. The court did so on the grounds that the firm which benefited from the racial preference in this case was affiliated with a Native-Alaskan corporation and, that the preference, therefore, warranted the less searching scrutiny reserved for tribal preferences under *Morton v. Mancari*, 417 U.S. 535 (1974). It came to this conclusion despite the absence of any legislative record or history to suggest, much less confirm, that Congress intended that the § 8014 exemption from competition be restricted to Indian tribes or that it otherwise sought to address uniquely Indian interests.

This Court has consistently distinguished between "preference[s] . . . directed towards a 'racial' group consisting of 'Indians' " and "preference[s] . . . to members of 'federally recognized' tribes" in subjecting the latter to rational basis review. *Morton v. Mancari*, 417 U.S. at 553, n. 24; *Rice v. Cayetano*, 528 U.S. 495, 519-520 (2000). It has done so on the theory that a tribal "preference [is] political rather than racial in nature," *Mancari*, 417 U.S. at 553-554, even though a tribal "classification ha[s] a racial component." *Rice v. Cayetano*, 528 U.S. at 519.

In upholding the Native-American preference at issue here, the court of appeals flipped the *Mancari* principle—that congressionally enacted tribal preferences are permissible despite the fact that there is a necessarily racial component in the definition of a tribal group—to reach the untenable position that Congress may enact a constitutionally invalid racial preference for Native-Americans as long as Indian tribes or tribal members qualify as beneficiaries.

As the opinion of the court below demonstrates, the risk of confusion in this area is substantial. While some political preferences for Native American tribes may be permissible despite their racial component, an otherwise impermissible racial preference for Native Americans is not rendered permissible by the fact that it may benefit a tribal organization. The decision below further reflects the critical consequence of error insofar as it shields a patently racial preference from strict scrutiny. This case provides an opportunity for the Court to clarify this area of the law by defining the circumstances in which a Native American preference is "political rather than racial in nature." *Mancari*, 417 U.S. at 553-554.

1. No racial group, including Native Americans, enjoys an elevated status in the eyes of the law. *See Adarand*, 515 U.S. at 239 ("In the eyes of government, we are just one race here." (J. Scalia, concurring in part, and concurring in the

judgment)). The §8014 preference on its face grants preferential treatment to Native American contractors without regard to their status as members of federally recognized Indian tribes or to whether the legislation affects uniquely Indian interests.[3] Likewise, there is no legislative record from which to glean congressional intent to restrict the special exemption from competitive procurement requirements to federally recognized Indian tribes.

The court of appeals nevertheless upheld the facially race-based preference at issue here as permissible under the rational basis standard prescribed by *Morton v. Mancari*. In so doing, it stretched *Mancari's* careful designation of certain Indian preferences as "political" rather than racial beyond the constitutional breaking point. By resolving the question presented in this case, the Court has an opportunity to clarify that *Mancari* is confined to legislation dealing with federally recognized Indian tribes as sovereign entities or with matters that affect uniquely Indian interests.

a. In *Morton v. Mancari*, the Court rejected an equal protection challenge to a hiring preference for Indians in the Bureau of Indian Affairs. 417 U.S. at 537. In upholding the preference, the Court characterized it as political, rather than racial, because "it applies only to members of 'federally recognized' tribes [which] operates to exclude many indi-

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[3] The preference first appeared in the Defense Appropriations Act of 1990. *See* Defense Appropriations Act, Pub.L. 101-165, § 9036. Prior to that, and beginning in 1985, the Appropriations Acts contained only language to the effect that no activity being performed by more than 10 people could be carried out until an MEO cost analysis was completed. *See* Department of Defense Appropriations Act of 1986, Pub.L 99-190, § 8089 (Dec. 19, 1985); Department of Defense Appropriations Act of 1987, Pub.L 99-500, § 9078 (Oct. 18, 1986); Department of Defense Appropriations Act for 1988, Pub.L 100-202, § 8074 (Dec. 22, 1987); Department of Defense Appropriations Act for 1989, Pub.L 100-463, § 8061 (Oct. 1, 1988).

viduals who are racially to be classified as 'Indians.'" *Id.* at 553, n. 24. The Court found that it was "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." 417 U.S. at 554. Thus, the Court ruled that its constitutionality would have to be adjudged in the context of the "unique legal status of Indian *tribes* under federal law." *Id.* at 551 (emphasis added) ("[l]iterally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations"). Consequently, the Court went on to apply the rational basis standard of review in assessing whether the preference was consistent with the Equal Protection guarantee of the Fifth Amendment.

However, in *Morton v. Mancari*, the Court did *not* transform, by judicial fiat, a statutory preference for "Native-Americans" from a racial to a political category, as the court of appeals did here. On the contrary, the Court took pains to acknowledge that it was *not* facing "the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." 417 U.S. at 554.

By contrast, the Native American preference in §8014 is *precisely* the type of blanket exemption that the Court refrained from approving in *Morton v. Mancari*. For example, it cannot be read to "exclude many individuals who are racially to be classified as 'Indians.'" *Id.* at 553, n. 24. Nor is it limited to "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 554. There is no evidence that Congress enacted this measure to fulfill its unique trust obligations to Indian tribes or to enhance greater participation by Native-Americans in their own self-government. *Id.* at

541-542. Absent any of the qualifying limitations inherent in the provision before the Court in *Morton v. Mancari*, that decision simply does not control the analysis as to the constitutionality of the §8014 preference at issue here.

b. In *Rice v. Cayetano*, this Court explicitly recognized the limited nature of the *Mancari* doctrine. 528 U.S. at 518-522. There, a Hawaiian citizen challenged a Hawaii Constitution restriction limiting voting for trustees of a state agency devoted solely to administering programs designed for the benefit of native Hawaiians and descendents of inhabitants of the Hawaiian Islands in 1778. The individual challenged the restriction as a violation of the 15th Amendment. Among the defenses offered by the state of Hawaii was that the differential voting scheme was permissible under *Morton v. Mancari*. 528 U.S. at 518.[4] Recognizing congressional authority to enact legislation "dedicated to the [ ] circumstances and needs of Indian tribes," the Court at the same time emphasized that the *Mancari* decision was "confined to the authority of the BIA, an agency described as '*sui generis*'." *Rice v. Cayetano*, 528 U.S. at 520.

Although *Rice v. Cayetano* involved a 15th Amendment challenge, the Court's view of the limited scope of *Mancari*—and its patent hostility toward the type of bootstrapping from that decision advocated by Hawaii—is certainly instructive here. It is also noteworthy that in *Rice v.*

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[4] Addressing that claim, the Court first characterized *Mancari* and its predecessors as holding that "various tribes retained some elements of quasi-sovereign authority, . . . [that] relates to self-governance." *Rice v. Cayetano*, 528 U.S. at 518. But it went on to say that sustaining Hawaii's restrictions under *Mancari* would require that the Court "accept some beginning premises not yet established" in caselaw. *Id.* Among these was whether native Hawaiians have the status of organized Indian tribes and whether Congress could in any event delegate its authority to the state. *Id.* Even so, the Court categorically rejected the premise that Congress could in any event authorize a State to create a voting scheme that excluded citizens on the basis of race. *Id.* at 519.

*Cayetano* this Court rebuffed the government's attempt to characterize the elections as tribal even though the programs at issue were administered solely for native Hawaiians. 528 U.S. at 520. By contrast, the court of appeals here looked only at how the Native American preference had been applied by the Kirtland AFB officials—and erroneously concluded that it had been applied to Indian tribes or members of Indian tribes in this case—in characterizing the preference as tribal in order to apply the relaxed standard enunciated in *Morton v. Mancari* rather than the strict scrutiny in *Adarand*.

2. After *Adarand*, it is untenable to presume that any statutory racial classification, even a Native-American one, is shielded from strict scrutiny. Indeed, the Small Business Act provision under review in that case mandated preferential treatment for identified minorities, including "Native-American." *Adarand*, 515 U.S. at 207. Holding the entire provision subject to strict scrutiny, the Court did not segregate out "Native-American" from the other racial categories in order to apply rational basis review. On the contrary, the Court reiterated that "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'" *Adarand*, 515 U.S. at 222 *quoting City of Richmond v. J.A. Croson*, 488 U.S. 469, 493-494 (1989) (Richmond's unconstitutional set-aside provision also included Native-American reference).

Consequently, as a racial classification appearing on the face of the statute, the § 8014 Native American preference should have automatically triggered the strict scrutiny that is necessary for determining whether its passage was motivated by an illegitimate purpose, such as " 'simple racial politics.' " *Shaw v. Reno*, 509 U.S. 630, 642 (1993) *quoting City of Richmond v. J.A. Croson Co.*, 488 U.S. at 493.

Instead, the D.C. Circuit erroneously employed the rational basis review reserved for federal legislation that is directed at

unique Indian interests under *Morton v. Mancari*, 417 U.S. 535. The resulting application of a highly deferential standard of review to a naked legislative preference for Native Americans, enacted without *any* indication that Congress was exercising its power to deal with Indian tribes as sovereign entities, demonstrates the need for this Court's intervention.

The line between tribal and racial classifications is not easily distinguishable, as the Court acknowledged in *Rice v. Cayetano*, 520 U.S. at 519, when it recognized that permissible federal Indian legislation has a "racial component." This does not mean, however, as the court of appeals believed here, that federal legislation directed at Native Americans is constitutionally permissible because it might also encompass members of Indian tribes. By addressing the questions raised in this case, the Court has an opportunity to clarify the distinction between valid tribal preferences under *Morton v. Mancari* and constitutionally suspect race-based preferences for Native-Americans under *Adarand*.

3. The courts of appeals have taken widely contrary approaches in addressing Indian preferences in light of *Adarand*. The divergence is readily reflected in the opinion of the D.C. Circuit in this case and that of the Ninth Circuit in *Williams v. Babbitt*, 115 F.3d 657, 664-665 (9th Cir.), *cert. denied sub nom. Kawarek Reindeer Herders Assoc. v. Williams*, 523 U.S. 1117 (1997).

In this case, the D.C. Circuit applied *Morton v. Mancari* to a broad contracting preference for Native Americans - enacted without regard to their status as members of federally recognized Indian tribes or to whether the legislation affects uniquely Indian interests. This approach fundamentally and significantly differs from that of the Ninth Circuit in *Williams v. Babbitt*. The issue there involved a Bureau of Indian Affairs interpretation of the Reindeer Industry Act of 1937 prohibiting non-native Alaskans from importing reindeer. The non-native herders appealed on equal protection grounds.

Although ultimately finding that the agency was wrong in interpreting the Act as restricting non-native participation, the Ninth Circuit clearly did so to avoid the grave constitutional difficulty, especially apparent in light of *Adarand*, posed by a broad construction of *Morton v. Mancari* that might render such a preference constitutionally permissible. *Williams v. Babbitt*, 115 F.3d at 663-666. Looking at this Court's decisions permitting special treatment for Indians, the Ninth Circuit recognized that they all "dealt with life in the immediate vicinity of Indian land." It further found, however, that even if *Mancari* is not necessarily confined to statutes involving the treatment of Indians on Indian lands, it should nevertheless be read "as shielding only those statutes that affect uniquely Indian interests." *Id.* at 665.

By granting *certiorari* now, the Court can provide much needed resolution and guidance to the lower courts on the constitutional scope of *Mancari's* "political classification" analysis and reconcile any confusion between that decision and the judicial hostility toward racial preferences reflected in *Adarand*.

4. Addressing the constitutional question posed by the racial preference at issue here provides the Court with a singular opportunity to clarify the confines of its ruling in *Morton v. Mancari* without calling into question the extensive array of constitutionally permissible Indian legislation. Specifically, the § 8014 preference which gave rise to this action was applied in a limited number of instances before Congress amended the provision in response to this litigation.[5] Thus, while a determination that it fails the strict

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[5] This case arose in the context of the award of a ten-year contract to Chugach Management Services, Joint Venture—which petitioners have never conceded qualifies as an "Indian tribe"—to perform base maintenance work at Kirtland AFB without conducting the required cost-comparison between in-house and contractor performance. The resulting direct conversion pursuant to §8014(3) of Pub.L. 106-79 culminated in the

scrutiny test under *Adarand* will provide meaningful relief to the petitioners, such a holding need not threaten the legitimacy of ongoing legislation that was in fact enacted by Congress to fulfill its unique trust obligations to Indian tribes.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 4, 2003

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elimination of federal jobs performed by federal employees including the individual plaintiffs and members of American Federation of Government Employees ("AFGE"), Local 2263. Petitioners continue to seek an opportunity to compete for the work that was denied them by virtue of the unconstitutional Native American preference in §8014(3). That Congress amended §8014(3) in subsequent appropriations acts to read "under 51% ownership by an Indian tribe, as defined in 25 U.S.C. 450b(e), or a Native Hawaiian organization, as defined in 15 U.S.C. 647(a)(15)" does not afford petitioners the remedy that they seek and therefore does not moot petitioners' claims for relief.

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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No. 02-5142

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,

*Appellants*,

v.

UNITED STATES OF AMERICA, *et al.*,

*Appellees*.

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Argued March 13, 2003
Decided June 6, 2003

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Before: RANDOLPH and ROGERS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*:

Section 8014 of the Defense Appropriations Act for fiscal year 2000 granted an outsourcing preference for firms "under 51 percent Native American ownership," Pub.L. No. 106-79, § 8014(3), 113 Stat. 1212, 1234 (1999). The question is whether this preference constituted racial discrimination in violation of the Fifth Amendment's Due Process Clause.

Plaintiffs are the American Federation of Government Employees, AFL-CIO; an affiliated local union representing civilian Defense Department employees at the Kirtland Air Force Base in New Mexico; and two civilian Defense Department employees who were allegedly displaced when the Air Force, invoking § 8014(3), awarded a contract to

Chugach Management Services Joint Venture in July 2000 to perform maintenance work at the base. The contract was for one year, with nine one-year options to renew. Chugach is a joint venture of Chugach Management Services, Inc., and Alutiiq Management Services, LLC. Chugach Management Services is a wholly owned subsidiary of Chugach Alaska Corporation, one of the Alaska Native Corporations established under the Alaska Native Claims Settlement Act. See 43 U.S.C. § 1606(a)(9). Alutiiq is a wholly owned subsidiary of Afognak Village Corporation, one of the village corporations formed pursuant to that legislation. *See* 43 U.S.C. §§ 1607, 1610(b)(1). Both Chugach Alaska Corporation and Afognak Village Corporation are federally recognized Indian tribes. 25 U.S.C. § 450b(e). Their joint venture thus qualified for special treatment under § 8014(3) of the FY 2000 appropriations act. The nature of the special treatment is as follows.

The FY 2000 appropriations act prohibited the Defense Department from using appropriated funds to pay private contractors for performing work previously done by more than ten government employees unless the Department first performed a "most efficient and cost-effective organization analysis" and certified the analysis to the House and Senate Committees on Appropriations. Department of Defense Appropriations Act, 2000, Pub.L. No. 106-79, § 8014, 113 Stat. 1212, 1234 (1999). This provision contained an exception for a "commercial or industrial type function of the Department of Defense" that was "planned to be converted to performance by a qualified firm under 51 percent Native American ownership." *Id.* § 8014(3), 113 Stat. 1234. A similar exception first appeared in the Defense Appropriations Act for fiscal year 1990; appropriations acts for fiscal years 1991 through 1999 contained similar language. *See* Pub.L. No. 101-165, § 9036, 103 Stat. 1112, 1137 (1989) (FY 1990); Pub.L. No. 101-511, § 8026, 104 Stat. 1856, 1880 (1990) (FY 1991); Pub.L. No. 102-172, § 8026, 105 Stat. 1150, 1177

(1991) (FY 1992); Pub.L. No. 102-396, § 9026, 106 Stat. 1876, 1906 (1992) (FY 1993); Pub.L. No. 103-139, § 8022, 107 Stat. 1418, 1442 (1993) (FY 1994); Pub.L. No. 103-335, § 8020, 108 Stat. 2599, 2621 (1994) (FY 1995); Pub.L. No. 104-61, § 8020, 109 Stat. 636, 656 (1995) (FY 1996); Pub.L. No. 104-208, § 8015, 110 Stat. 3009, 3009-91 (1996) (FY 1997); Pub.L. No. 105-56, § 8014, 111 Stat. 1203, 1223 (1997) (FY 1998); Pub.L. No. 105-262, § 8014, 112 Stat. 2279, 2300 (1998) (FY 1999).

The Chugach contract at Kirtland was the only one the Air Force awarded pursuant to § 8014(3) of the FY 2000 appropriations act, and so far as the parties know, the only such contract awarded by the Defense Department. In the next year Congress altered the language of § 8014(3), so that the exception applied not to "Native American ownership" but to "ownership by an Indian tribe, as defined in section 450b(e) of title 25, United States Code, or a Native Hawaiian organization, as defined in section 637(a)(15) of title 15, United States Code." Department of Defense Appropriations Act, 2001, Pub.L. No. 106-259, § 8014, 114 Stat. 656, 677 (2000).

In the district court, plaintiffs claimed that § 8014(3), as contained in the FY 2000 act, violated the equal protection component of the Due Process Clause and deprived them of an interest in federal employment in violation of substantive due process. The district court granted Chugach's motion to intervene as a defendant, and denied plaintiffs' motion for a preliminary injunction. *Am. Fed'n of Gov't Employees v. United States*, 104 F.Supp.2d 58 (D.D.C.2000). Both sides later moved for summary judgment. The court construed the statute to apply only to ownership by an Indian tribe and, applying rational basis review, found no unconstitutional discrimination. *Am. Fed'n of Gov't Employees v. United States*, 195 F.Supp.2d 4, 18-24 (D.D.C.2002). The court also granted summary judgment for the defendants on the

substantive due process claim, finding no fundamental right to federal employment. *Id.* at 25.

Plaintiffs believe § 8014(3) is unconstitutional under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 2112-13, 132 L.Ed.2d 158 (1995), because "Native American" is a racial classification, and because § 8014(3) does not serve a "compelling governmental interest" and is not "narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235, 115 S.Ct. at 2117. The statute is not "narrowly tailored" to benefit Native Americans, they say, in light of the fact that non-Indians may own as much as 49 percent of a qualifying firm. The statute does not serve a "compelling interest" because there is no evidence, no congressional findings, no record of legislative deliberations, to demonstrate that Congress thought it was acting to fulfill its historic trust responsibilities toward Indians.

For its part, the government urges us to construe § 8014(3) to avoid any constitutional doubts plaintiffs may have raised and to hold that the provision applies only to "members" of federally recognized Indian tribes and "tribal entities." The government believes these classifications are, in light of *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974), non-racial and hence constitutional so long as they rationally relate to the government's trust responsibilities toward Indian tribes. Brief for Federal Appellees at 15. Although there was no regulation or formal policy reflecting the government's suggested interpretation of § 8014(3), the Defense Department may have followed it in practice. The government's statement of material facts not in dispute, and an affidavit from an Air Force contracting officer, indicate that other than the Kirtland contract, the Air Force had only once before—under an earlier appropriations act—awarded a contract pursuant to a comparable provision. That contract also went to an Alaska Native Corporation.

We will begin our analysis with some winnowing. Among their prayers for relief, plaintiffs sought to enjoin the government from awarding "any contract under the preference given to 51% Native-American owned firms in § 8014 of FY 2000 Defense Appropriations Act." That fiscal year has long since passed. This particular claim for relief, which we read as referring to initial awards of contracts, is therefore moot. Plaintiffs also sought to enjoin the government from renewing "any contract granted under, or otherwise in effect due to" the preference in § 8014(3). For plaintiffs to have standing to seek such broad relief—relating not just to the renewal of the contract at Kirtland, but to the renewal of "any contract"—they must be under some real and imminent threat of harm. The Supreme Court in *Adarand*, 515 U.S. at 211, 115 S.Ct. at 2104-05, so held in a similar situation. But plaintiffs have not established that they are under such a threat. They have identified no other § 8014(3) contract still subject to renewal. Plaintiffs therefore lack standing to pursue this claim for relief insofar as it relates to contracts other than the one at Kirtland.

We believe the case must be narrowed in another, related respect. Although the Kirtland § 8014(3) contract was awarded to a firm wholly owned by federally recognized Indian tribes, plaintiffs want us to decide that the provision is unconstitutional because, in FY 2000, it authorized preferences not only for Indian tribes but also for firms owned by Native Americans who were not tribal members and who owned no more than 51 percent of the firm. Plaintiffs thus want to expand this case well beyond its factual context. Prudence, as reflected in a longstanding rule of constitutional adjudication, counsels otherwise. The Supreme Court summarized the rule in *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960): "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which

application might be unconstitutional." The Court reiterated the point in *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973): "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." These passages, we believe, describe plaintiffs' arguments in this case. The only relief they are possibly entitled to receive, for reasons already mentioned, is specific to Kirtland. Yet they spend almost all their time objecting to § 8014(3)'s preference in favor of non-tribal Native American firms.

To put the matter somewhat differently, the "Native Americans" preference in § 8104(3) breaks down into at least three possible classifications: (1) federally recognized Indian tribes, (2) members of federally recognized Indian tribes, and (3) all others who might be deemed Native Americans. If these three classifications had been set forth as separate subsections, and if we had a case involving only a preference granted under (1), we would normally confine our decision to the validity of that provision and apply rational basis review. We say "normally" because the situation might be different if the injured party were claiming that Congress, in enacting (1), had some illegitimate purpose in mind, compare *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), or that Congress would not have enacted (1) unless the other subsections were included in the statute. But plaintiffs here have made no such claims. Nor have they offered anything to suggest that there were any other § 8014(3) contracts awarded in FY 2000, or that any contract went to the type of Native American firm they imagine, or that they were thereby adversely affected. We will therefore limit our decision to the facts of this case. The only question properly before us is whether the government violated the

equal protection component of the Due Process Clause when it invoked § 8014(3) to grant a contract to a firm wholly owned by Indian tribes.

Our approach is, we believe, not only faithful to Article III of the Constitution, but also consistent with the Court's admonition in *Raines* that federal courts should avoid "premature interpretations of statutes in areas where their constitutional application might be cloudy." *Raines*, 362 U.S. at 22, 80 S.Ct. at 523. In saying this, the Court had in mind another doctrine of constitutional adjudication. For many years, the Court has followed a practice of construing federal statutes to avoid serious doubts about the statutes' constitutionality without the saving constructions. *See* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997). This is the practice the government asks us to follow in this case: when "an otherwise acceptable construction of a statute would raise serious constitutional problems, [a court] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988). Judge Friendly believed the doctrine had to be confined to cases in which "the doubt is exceedingly real. Otherwise this rule, whether it be denominated one of statutory interpretation or, more accurately, of constitutional adjudication—still more accurately, of constitutional nonadjudication—is likely to become one of evisceration and tergiversation." Henry J. Friendly, Benchmarks 211-12 (1967).

Judge Friendly's formulation captures an important qualification to the saving-construction doctrine—namely, that the constitutional doubt must be "real." Hypothetical applications of a statute, or to be more precise, hypothetical applications of § 8014(3), must be likely. Otherwise the constitutional doubt raised by legal arguments about those

hypothetical applications cannot be considered real. Without this qualification, the courts would risk giving advisory and unnecessary statutory interpretations, based on judicial expressions of doubts regarding the constitutionality of statutes as applied to situations that may never arise. For these reasons, and because we believe the only issue properly before us is the validity of a preference for Indian tribes, we decline the government's request for a narrowing interpretation of § 8014(3).

What we have written thus far is consistent with the Supreme Court's disposition in *Adarand*. Under federal law, some prime contractors received additional compensation if they hired as subcontractors firms owned by individuals who were socially and economically disadvantaged. "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" were presumed to be socially and economically disadvantaged. 515 U.S. at 205, 115 S.Ct. at 2102. A subcontractor sued after a prime contractor rejected its low bid in favor of a firm in one of these racial categories. Which racial category did not matter. Adarand wished to bid on government contracts in the future; the preference would therefore injure it no matter which of the listed minority groups owned the competing firm. The Court therefore did not focus on the Native American classification. Even if it had, and even if it had limited the preference to Indian tribes, we very much doubt that the doctrine of severability could have been stretched to save this small part of the law. *See, e.g., United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 & n. 26, 115 S.Ct. 1003, 1019 & n. 26, 130 L.Ed.2d 964 (1995).

With respect to the question properly before us, only a few general principles of federal Indian law need to be mentioned. Congress has the power "[t]o regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3. Congress thus has the authority, exclusive of the States, to determine which

"distinctly Indian communities" should be recognized as Indian tribes. *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 6, 58 L.Ed. 107 (1913). The "plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes . . . is drawn both explicitly and implicitly from the Constitution itself." *Mancari*, 417 U.S. at 551-52, 94 S.Ct. at 2483. For these reasons, and others, the Supreme Court has sustained "legislation that singles out Indians for particular and special treatment." *Id.* at 554-55, 94 S.Ct. at 2485. The Court's decisions "leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645, 97 S.Ct. 1395, 1398, 51 L.Ed.2d 701 (1977).

*Morton v. Mancari*, for instance, upheld a longstanding statutory preference for hiring members of federally recognized Indian tribes to fill positions in the Department of Interior's Bureau of Indian Affairs. Two years after *Mancari*, the Court sustained as against an equal protection challenge a court-ordered exemption from a state sales tax for cigarettes sold on a reservation to tribal members residing on the reservation. *See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479-80, 96 S.Ct. 1634, 1644-45, 48 L.Ed.2d 96 (1976). In both cases, the Court tested the special preference in terms similar to those used in judging equal protection attacks on other economic legislation. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-76, 101 S.Ct. 453, 459-60, 66 L.Ed.2d 368 (1980); *Williamson v. Lee Optical*, 348 U.S. 483, 491, 75 S.Ct. 461, 466, 99 L.Ed. 563 (1955). For legislation regulating commerce with Indian tribes, as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555, 94 S.Ct. at 2485; *Delaware Tribal Business*

*Comm. v. Weeks*, 430 U.S. 73, 85, 97 S.Ct. 911, 919, 51 L.Ed.2d 173 (1977); *Moe*, 425 U.S. at 480, 96 S.Ct. at 1644-45. In *Narragansett Indian Tribe v. National Indian Gaming Commission*, 158 F.3d 1335 (D.C.Cir.1998), we summed up the state of the law this way: "ordinary rational basis scrutiny applies to Indian classifications just as it does to other non-suspect classifications under equal protection analysis." *Id.* at 1340.

On the other hand, "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227, 115 S.Ct. at 2113.

These two lines of authority may be reconciled, plaintiffs argue, on the basis that the preference in *Mancari* was limited to members of federally recognized Indian tribes, while the preference in *Adarand* was not so limited, and thus constituted—in the Court's words in *Mancari*—a preference "granted to Indians . . . as a discrete racial group," 417 U.S. at 554, 94 S.Ct. at 2484; *see United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1012 n. 8 (D.C.Cir.2002); *Narragansett Indian Tribe*, 158 F.3d at 1340-41. That distinction aside, the Supreme Court has made it clear enough that legislation for the benefit of recognized Indian tribes is not to be examined in terms applicable to suspect racial classifications. Not only in *Mancari*, but also in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761-62, 58 L.Ed.2d 740 (1979), the Court held that "'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive" (quoting *Mancari*, 417 U.S. at 551-52, 94 S.Ct. at 2483).

Despite these precedents, plaintiffs argue that § 8014(3) should be tested by "strict scrutiny" rather than rational basis review because the Supreme Court in *Mancari* thought it important that the preference for tribal members there applied only to employment in the Indian service. *See Rice v. Cayetano*, 528 U.S. 495, 519-20, 120 S.Ct. 1044, 1058-59, 145 L.Ed.2d 1007 (2000); *Williams v. Babbitt*, 115 F.3d 657, 663-64 (9th Cir.1997). Hence the Court did not have to face what it called "the obviously more difficult question" whether "a blanket exemption for Indians from all civil service examinations" would be constitutional. *Mancari*, 417 U.S. at 554, 94 S.Ct. at 2484-85. The preference in § 8014(3), plaintiffs say, is analogous to such a blanket exemption: it is not restricted to Indian activities on or near reservations or Indian land; and it does not deal with uniquely Indian interests.

Whatever the significance of the *Mancari* dictum—the Court said the case would be "more difficult," not that the blanket exemption would be unconstitutional—the question before us is not in the "difficult" category. The critical consideration is Congress' power to regulate commerce "with the Indian Tribes." While Congress may use this power to regulate tribal members, *see United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417, 18 L.Ed. 182 (1865), regulation of commerce with tribes is at the heart of the Clause, particularly when the tribal commerce is with the federal government, as it is here. 2 THE FOUNDERS' CONSTITUTION 530-31 (Philip B. Kurland & Ralph Lerner eds.1987). When Congress exercises this constitutional power it necessarily must engage in classifications that deal with Indian tribes. Justice Scalia, when he was on our court, put the matter this way: "in a sense the Constitution itself establishes the rationality of the . . . classification, by providing a separate federal power that reaches only the present group." *United States v. Cohen*, 733 F.2d 128, 139 (D.C.Cir.1984) (*en banc*). He then quoted the following passage from *United States v.*

*Antelope*, 430 U.S. at 649 n. 11, 97 S.Ct. at 1400 n. 11: the "Constitution itself provides support for legislation directed specifically at Indian tribes."

As to the rational basis for § 8014(3), plaintiffs say the objective cannot be the obvious one—namely, tribal economic development, which the Supreme Court has described as an "important federal interest[ ]." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17, 107 S.Ct. 1083, 1091-93, 94 L.Ed.2d 244 (1987). They point to "the absence of any evidence suggesting Congress' actual intent with regard to § 8014." Reply Brief at 18-19. By this they apparently mean, as they said in discussing strict scrutiny, that "Congress did not hold hearings, make findings, or otherwise generate a strong record" regarding any "socio-economic hardships suffered by Native Americans"; that the statute "contains no language defining its purpose or otherwise illuminating Congress' intent"; and that no one can say what actually "motivated" Congress. Brief for Appellants at 21-22. But Congress is not required to "articulate its reasons for enacting a statute." *Fritz*, 449 U.S. at 179, 101 S.Ct. at 461. The Constitution grants Congress discretion to regulate its internal proceedings. Article I, § 5, cl. 2, for example, empowers it to determine the rules of its proceedings. Incident to its lawmaking authority, Congress has the authority to decide whether to conduct investigations and hold hearings to gather information. *See Watkins v. United States*, 354 U.S. 178, 193, 77 S.Ct. 1173, 1182, 1 L.Ed.2d 1273 (1957); *McGrain v. Daugherty*, 273 U.S. 135, 174-75, 47 S.Ct. 319, 328-29, 71 L.Ed. 580 (1927). And under the Constitution, Congress has broad discretion in determining what must be published in the official record. *See Field v. Clark*, 143 U.S. 649, 671, 12 S.Ct. 495, 497, 36 L.Ed. 294 (1892). As Professor Currie has pointed out, in the First Congress Senate deliberations were not even open to the public and the House did not provide verbatim transcripts of debates. David P. Currie, *The Constitution in Congress: The*

*First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 166 (1995). While "[e]ach House shall keep a Journal of its Proceedings," U.S. Const. art. I, § 5, cl. 3, there is certainly no textual basis for requiring Congress to hold hearings, issue committee reports, or enact findings or statements of purpose, *see Nixon v. United States*, 506 U.S. 224, 228-29, 113 S.Ct. 732, 735-36, 122 L.Ed.2d 1 (1993), even though these might assist judicial review and sometimes carry weight. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-72, 121 S.Ct. 955, 964-67, 148 L.Ed.2d 866 (2001); *United States v. Lopez*, 514 U.S. 549, 562-63, 115 S.Ct. 1624, 1631-32, 131 L.Ed.2d 626 (1995); *but cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-68, 114 S.Ct. 2445, 2470-72, 129 L.Ed.2d 497 (1994) (plurality opinion). If "there are plausible reasons for Congress' action, our inquiry is at an end," even if Congress did not expressly state those reasons or act on them. *Fritz*, 449 U.S. at 179, 101 S.Ct. at 461; *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682-83, 20 L.Ed.2d 672 (1968).

It was therefore entirely proper for the district court to examine legislative material, generated in other contexts, showing the need for economic development of federally recognized tribes in Alaska. *Am. Fed'n of Gov't Employees*, 195 F.Supp.2d at 23. The United States has marshalled still more authorities to the same effect but we see no need to go into them. Brief for Federal Appellees at 31-36 & nn.15-22. Plaintiffs do not really dispute the material. They say that it cannot be considered, a claim we have just rejected. We therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83, 120 S.Ct. 631, 645, 145 L.Ed.2d 522 (2000).

All that remains is plaintiffs' claim, made in one paragraph of their brief, that § 8014(3) violates substantive due process under the Fifth Amendment because they, or at least some of them, have a property interest in federal employment. The government may infringe upon fundamental property interests only if the infringement is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993). Absent a suspect classification or infringement of a fundamental interest, the Fifth Amendment requires only a rational basis. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 2100-01, 124 L.Ed.2d 211 (1993); *Waters v. Rumsfeld*, 320 F.3d 265, 268 (D.C.Cir.2003). Neither the Supreme Court nor this court has ever recognized an interest in public employment as fundamental. In fact, the Supreme Court has said that its decisions "give no support to the proposition that a right of government employment *per se* is fundamental," *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976) (*per curiam*), a statement the Court later described as a holding that "there is no fundamental right to government employment." *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219, 104 S.Ct. 1020, 1028, 79 L.Ed.2d 249 (1984). The right that plaintiffs allege is thus not one "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Flores*, 507 U.S. at 303, 113 S.Ct. at 1447 (internal quotation marks omitted). Accordingly, rational basis review applies and plaintiffs have failed to satisfy that standard for the same reasons their equal protection challenge fails.

The judgment of the district court granting summary judgment for the federal defendants and the intervenor-defendants is therefore

*Affirmed.*

**APPENDIX B**

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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No. 00—0936(RMU)

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
*Plaintiffs*,

v.

UNITED STATES OF AMERICA, *et al.*,
*Defendants*,

and

CHUGACH MANAGEMENT *et al.*,
*Intervenor-Defendants*.

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March 29, 2002

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MEMORANDUM OPINION

URBINA, *District Judge*.

DENYING THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; AND GRANTING THE INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

## I. INTRODUCTION

This Fifth Amendment due process case comes before the court on the parties' cross-motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). In a two-count amended complaint, the American Federation of Government Employees, the American Federation of Government

Employees, Local 2263 ("*AFGE*"), Rose Reed ("Reed"), and Inez Marquez ("Marquez") (collectively, "the plaintiffs") allege equal protection and substantive due process violations under the Fifth Amendment of the Constitution. The defendants are the United States and James G. Roche, in his official capacity as Secretary of the Air Force (collectively, "the defendants" or "the Air Force"). The intervenor-defendants are *Chugach* Management Joint Venture and *Chugach* Management Services, Inc. (collectively, "the intervenor- defendants" or "*Chugach*"), two corporations owned by Native Alaskans. The target of this lawsuit is Section 8014(3) of the Fiscal Year 2000 Defense Appropriations Act, Pub.L. No. 106-79, enacted October 25, 1999, 113 Stat. 1212, 1234 ("Section 8014(3)"). Section 8014(3) allows the Air Force to bypass the usual procedure for awarding a civil engineering contract and grant the contract to "a qualified firm under 51 percent Native American ownership." The plaintiffs ask this court to declare Section 8014(3) unconstitutional because it denies the plaintiffs an equal opportunity to compete for their jobs. After consideration of the parties' submissions and the relevant law, this court denies the plaintiffs' motion for summary judgment, grants the defendants' motion for summary judgment, and grants the intervenor-defendants' motion for summary judgment.

## II. BACKGROUND

### A. Factual Background

On June 11, 2001, the plaintiffs filed an amended complaint alleging that the defendants violated the plaintiffs' equal protection and due process guarantees. *See* Am.Compl. ¶¶ 34, 36. These claims arose out of the Air Force's award of a civil engineering contract pursuant to Section 8014(3). *See id.* ¶ 28. Under the statute, the Air Force cannot contract out work performed by more than 10 federal civilian employees until a most efficient and cost-effective organization

("MEO") analysis is completed and certified to Congress. *See id.* ¶ 17. There are three enumerated exemptions to the required MEO analysis, *8 one of which forms the basis of the plaintiffs' claim herein. *See id.* ¶ 29. The exemption at issue abrogates the requirement of the MEO analysis when the Air Force converts an activity or function to performance by a qualified firm under "Native American ownership." *See* § 8014(3); Am.Compl. ¶ 27. Pursuant to the exemption, the Air Force awarded a contract to two such firms, the intervenor-defendants. *See* Am.Compl. ¶ 31.

Plaintiff Reed served as an electronic mechanic at Kirtland Air Force Base. *See id.* ¶ 6. Plaintiff Marquez was a material handler at Kirtland Air Force Base. *See id.* ¶ 10. Both of their positions were eliminated when the Air Force awarded the contract for the performance of civil engineering functions at Kirtland Air Force Base to *Chugach*. *See id.* ¶¶ 6, 10. Plaintiff *AFGE* is a labor organization whose members occupy positions that are affected by application of the Section 8014(3) exemption. *See id.* ¶ 3. Plaintiff *AFGE* Local 2263 is the exclusive representative of the civilian employees of the Air Force Material Command at Kirtland Air Force Base. *See id.* ¶ 4. Plaintiffs Reed and Marquez allege denial of an equal opportunity to compete for their jobs by virtue of the Air Force's use of the exemption at issue, Section 8014(3). *See id.* ¶¶ 7, 11, 28. Plaintiffs *AFGE* and *AFGE* Local 2263 represent the interests of their members whose constitutional rights have allegedly been and will continue to be violated by operation of Section 8014(3). *See id.* ¶ 3.

B. Procedural History

On May 1, 2000, the plaintiffs filed the complaint and motion for a preliminary injunction. On the same day, *Chugach* filed a motion to intervene and this court granted that motion on May 3, 2000. *See* Order dated May 3, 2000. This court issued a Memorandum Opinion on June 30, 2000 and a supplemental order on July 5, 2000, denying the

plaintiffs' motion for a preliminary injunction. *See AFGE v. United States*, 104 F.Supp.2d 58 (D.D.C.2000); Order dated July 5, 2000. After seeking leave of this court to extend the defendants' time to answer the complaint, the defendants filed an answer on July 31, 2000. On August 7, 2001, all parties filed their respective motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(c). Those cross-motions for summary judgment are presently before the court. For the reasons that follow, the court denies the plaintiffs' motion for summary judgment, grants the defendants' motion for summary judgment, and grants the intervenor-defendants' motion for summary judgment.

## III. ANALYSIS

### A. Legal Standards

#### 1. Legal Standard for a Motion for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C.Cir.1995). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *See Celotex*, 477 U.S. at 322, 106 S.Ct. 2548; *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *See*

*Anderson*, 477 U.S. at 255, 106 S.Ct. 2505. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *See id.* at 252, 106 S.Ct. 2505. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *See Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *See id.*

In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *See Greene v. Dalton*, 164 F.3d 671, 675 (D.C.Cir.1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C.Cir.1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *See Greene*, 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50, 106 S.Ct. 2505 (internal citations omitted).

2. Legal Standard for Standing

Article III of the Constitution limits the jurisdiction of United States courts to "cases" or "controversies." *See* U.S. Const. Art. III, § 2, cl. 1. Article III's prerequisites reflect the "common understanding of what it takes to make a justiciable case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Consequently, in order for this court to have jurisdiction over a case, each plaintiff must have standing to bring their claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

i. Individual Standing

An individual must satisfy a three-prong test to establish standing. *See id.* First, the individual must have suffered

some injury in fact—an invasion of a legally protected interest that is concrete and particularized and actual or imminent. *See id.* at 560, 112 S.Ct. 2130; *MD Pharmaceutical Inc. v. Drug Enforcement Admin.*, 133 F.3d 8, 11 (D.C.Cir.1998) (concluding that current manufacturer had standing to seek review of actions taken by the DEA). In some cases, a plaintiff may be injured when the "discriminatory classification prevent[s] the plaintiff from competing on an equal footing." *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (holding that when the government erects a barrier, in order to establish standing, a group seeking to challenge the barrier need not allege they would have attained the benefit but for the barrier); *Regents of the University of California v. Bakke*, 438 U.S. 265, 281, 98 S.Ct. 2733, 57 L.Ed.2d 750 (holding that an applicant need not show that he would have attained the seat in admitted class in order to have standing).

In contrast, other courts have found that when seeking retrospective relief, the alleged injury is the "actual denial of the benefit rather than the inability to have competed for the benefit on an equal footing." *Saunders v. White*, 191 F.Supp.2d 95, 104-05 (D.D.C.2002) (citing *Yeager v. General Motors Corp.*, 265 F.3d 389, 395 (6th Cir.2001); *Comfort v. Lynn School Committee*, 150 F.Supp.2d 285, 299-301 (D.Mass.2001); *Sims v. Ware*, 1999 WL 637226 at *2 (N.D.Texas Aug, 20, 1999)).

Second, the injury must be fairly traceable to the governmental conduct alleged. *See Warth v. Seldin*, 422 U.S. 490, 504, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (finding lack of standing where city residents failed to show a causal relationship between town's zoning practices and alleged injury); *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228 (D.C.Cir.1987) (holding that the plaintiff failed the second and third prongs of

standing). A plaintiff will not have standing if this court must accept a speculative inference or assumption to link the alleged injury to the challenged action. *See id.; Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 815 (D.C.Cir.2001) (declaring that the potential manufacturer's damages were not too speculative assuming it could claim its intent and preparedness to enter the market); *Advanced Mgmt. Tech. v. Federal Aviation Admin.*, 211 F.3d 633, 637 (D.C.Cir.2000) (holding that a contractor lacked standing on the theory of reputational injury).

Third, the plaintiff must prove that the alleged injury is likely to be redressed by a favorable decision of this court. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130; *Tozzi v. U.S. Dep't of Health and Human Servs.*, 271 F.3d 301 (D.C. Cir.2001) (recognizing that upgrade classification change from "reasonably anticipated" to "known" carcinogen caused some economic injury that could be redressed by reversing the classification).

ii. Organizational or Representational Standing

An organization has standing only if it meets a separate three-prong test. *See* Truckers United for Safety v. Mead, 251 F.3d 183 (D.C.Cir.2001) (holding that a motor carriers' association has standing to sue on behalf of its members for Department of Transportation's alleged abuses of agency authority). Such standing exists where the organization's members (1) would have standing to sue in their own right, (2) the interests that the organization seeks to protect are germane to its purposes, and finally, (3) neither the claims asserted nor the relief requested requires the participation of each of the organization's individual members. *See id.; Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Hunt v. Washington State Apple Comm'n*, 432 U.S. 333, 342-43, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (agreeing with the district court's determination that a commission has

standing to assert the claims of apple growers and dealers in its representational capacity); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C.Cir.2002) (applying test from *Laidlaw* and determining that no standing exists where a company has failed to show that individuals would have standing to sue in their own right).

3. Legal Standard for Equal Protection Claims

The Fourteenth Amendment's Equal Protection Clause[1] prevents a state from enacting any law that deprives "any person within its jurisdiction the equal protection of the laws." *See* U.S. CONST. amend. XIV, § 1. Although the Fourteenth Amendment provides an explicit equal protection directive to the states, the Supreme Court has held that the Fifth Amendment's Due Process Clause contains *11 an equal protection component applicable to the federal government. *See Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The D.C. Circuit has held the

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[1] The Supreme Court has held that there is no implied fundamental right to government employment for purposes of the Equal Protection Clause. *See United Building and Construction Trades Council v. Mayor of Camden*, 465 U.S. 208, 219, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984); *Massachusetts v. Murgia*, 427 U.S. 307, 313, 96 S.Ct. 2562, 49 L.Ed.2d 520. Notably, there is an intersection of implied fundamental rights and equal protection. *See United States v. Virginia*, 518 U.S. 515, 567, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). The question here pivots on the "fundamentality" of the interest and whether that interest is affected unequally. The equal protection prong and its appropriate level of scrutiny is triggered by the "suspectness" of the subject delineation. *See supra* Part III.A.3. For example, the Court has announced that there is a fundamental right, under equal protection jurisprudence, to procreate, vote, access the judicial process, and travel. *See Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (holding that the right to vote and to gain access to the ballot is fundamental); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (recognizing a fundamental right to access the judicial process via criminal appeal); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (stating that there is a fundamental right to travel).

same. *See Tucker v. Branker*, 142 F.3d 1294 (D.C.Cir.1998) (recognizing a federal government violation of the equal protection component of the Fifth Amendment's Due Process Clause). "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). There are three standards[2] of review which the Court has announced in the area of equal protection. These standards range in degree and dictate the depth of judicial scrutiny to be applied in equal protection claims. The key to evaluating a classification depends on the subject delineation, which, in turn, triggers the appropriate standard of review.

i. Strict Scrutiny for Race and Nationality Classifications

The court analyzes classifications based on race under strict scrutiny and upholds such classifications only if they are narrowly tailored to serve a compelling governmental objective. *See Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964). Likewise, classifications based on one's national origin are subject to

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[2] The first two standards encompass groups possessing the traditional indicia of "suspect" classes. Such indicia includes examination of whether the group is a discrete and insular minority and is without access to the political process ordinarily relied upon by minorities. *United States v. Carolene Products Co.*, 304 U.S. 144, 152- 53, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). Suspect classifications are ear-marked as such because they target minorities without access to the mechanism for change, are invidious, reinforces various stereotypes, and are an irrelevant basis upon which to draw a demarcation. *See San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 121, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). As such, the Court has not recognized "wealth" as a suspect classification. *See id.* Additionally "age" lacks the traditional indicia of a suspect class and therefore a classification based on age does not warrant a more heightened judicial scrutiny. *See Kimel v. Florida. Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

the same exacting standard. *See Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

ii. Heightened Scrutiny for Gender and Illegitimacy Classifications

The court does not permit delineations based on gender unless it is substantially related to an important governmental objective. *See Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001). The Supreme Court applies a quasi strict scrutiny analysis when it is faced with gender discrimination. *See United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). *12 As such, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.* at 531, 116 S.Ct. 2264. Notwithstanding that fact, illegitimacy is still analyzed through the lens of traditional intermediate scrutiny analysis. *See Lalli v. Lalli*, 439 U.S. 259, 275, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978).

iii. Rational Basis for All Other Classifications

The rational basis standard of review is the most deferential and only inquires as to whether there is a rational or reasonable relationship to a legitimate governmental objective. *See Williamson v. Lee Optical*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). If such a relationship exists, then the court will end its inquiry into the matter and declare the subject law constitutional. *See id.* In fact, a court may interject a hypothetical purpose or the parties may themselves proffer post-hoc rationales for the delineation. *See id.* at 487, 75 S.Ct. 461. Even though the subject classification is usually upheld under the rational basis standard of scrutiny, on occasion this test will result in the invalidation of a law or statute. *See Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

As such, the rational basis test has some teeth[3] because it leads to the abrogation of a law "whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *See Cleburne*, 473 U.S. at 446, 105 S.Ct. 3249; *Romer*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), (striking down a State's constitutional amendment as unconstitutional, though employing rational basis review, because it was enacted based on animus against individuals that practice alternative lifestyles).

4. Legal Standard for Due Process Claims

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." *See* U.S. CONST. amend. V. In order to have a life, liberty, or property interest, a person must have more than an abstract need or desire. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Instead, a person is required to have a legitimate claim of entitlement. *See id.* These interests are not created by the Constitution but are defined by existing "rules or understandings that secure certain benefits and that support claims of entitlement." *Id.* Before an entitlement in property may be taken away, the entity must provide adequate procedure, such as a hearing, to protect the individual's reliance interest. *See id.* Property rights in governmental employment are subject to *procedural due process*, but no substantive due process attaches to those rights. *See id.* (emphasis added).

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[3] When the Court employs rational basis review to strike down a classification, it is usually referred to as rational basis "with bite" or covertly heightened scrutiny. *See Access to Public Education*, 102 Harv.L.Rev. 201 (Harvard Law Review Association, Nov. 1988).

Substantive due process rights attach only when a fundamental right [4] is *13 involved, thus ensuring that those rights are not taken away merely through adequate procedural safeguards. *See Hutchins v. District of Columbia*, 188 F.3d 531, 535 (D.C.Cir.1999). The protection of fundamental rights is derived from the substantive component of the Fifth Amendment's Due Process Clause, which protects those rights that are "implicit in the concept of ordered liberty." *See Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 82 L.Ed. 288 (1937). Not all rights enumerated in the Bill of Rights are fundamental and warrant strict scrutiny analysis. *See Hutchins*, 188 F.3d at 538. When there is a classification that is protected by substantive due process, however, the appropriate judicial analysis is strict scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 521 U.S. 702 (1997). Such a classification will not survive unless it is found to be absolutely necessary or narrowly tailored to meet a compelling governmental interest. *See id.*

B. The Plaintiffs Have Standing to Assert Their Claims

1. The Court Determines That the Individual Plaintiffs Have Standing to Assert Their Cause of Action

Plaintiffs Reed and Marquez have met their burden of establishing standing, thus allowing this court to proceed to the merits of this suit. The standing requirement is a prudential limitation placed on the judiciary, which ensures

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[4] Fundamental rights are few. The history of substantive due process "counsels caution and restraint" in deciding what constitutes a fundamental right. *See Moore v. East Cleveland*, 431 U.S. 494, 502, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). The Court has rejected education and the receipt of public welfare as fundamental rights. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

its constitutionally mandated jurisdiction. *See Lujan*, 504 U.S. at 560, 112 S.Ct. 2130. The individual plaintiffs satisfy the prudential limitation of standing.

Both plaintiffs Reed and Marquez allege injury because they assert a deprivation of the opportunity to compete to retain federal employment by operation of Section 8014(3). *See* Pls.' Mem. in Supp. of Mot. for Summ.J. at 19. Plaintiff Marquez further alleges economic harm. *See id.* at 21. They assert that those injuries are directly traceable to the Air Force's award of the contract pursuant to Section 8014(3). *See id.* at 26. Additionally, the plaintiffs' maintain that the court can declare Section 8014(3) unconstitutional and, thus, require the status-quo pre-conversion. *See id.* The court now examines these assertions against the required three elements of standing: injury, traceability, and redressibility.

Plaintiff Reed is currently employed at Vandenburg Air Force Base in California. The defendants argue that plaintiff Reed does not have standing because she is employed in the same position at Vandenberg Air Force Base and that the Air Force paid her moving expenses to California, thus falling short of the injury component. *See* Defs.' Mem. in Supp. of Mot. for Summ.J. at 6-7. The defendants also argue that plaintiff Marquez lacks standing because she accepted a $25,000.00 voluntary separation payment, retired early, and accepted a similar job with Chugach, thus failing to meet the injury component. *See id.* at 8. The defendants' challenge to the individual plaintiffs' standing pivots on the assertion that there was no injury suffered by those plaintiffs. *See id.* From the defendants' standpoint, plaintiff Reed voluntarily chose to move to Vandenberg Air Force Base and continue employment while plaintiff Marquez retired early and accepted a job with Chugach. *See id.* Moreover, the defendants contend there was no guarantee of a job since any offer of employment depended on surviving the Air Force's MEO analysis. *See id.*

There are two ways to frame the injury argument. The first is that the plaintiff was not able to compete for the benefit on an equal footing, thus personally being subjected to different treatment. *See Northeastern Florida Chapter of Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993); *Saunders v. White*, 2002 WL 338744 (D.D.C. March 4, 2002) (Lamberth, J.). The second is the actual denial of the benefit. *See Yeager v. General Motors Corp.*, 265 F.3d 389, 395 (6th Cir.2001); *Saunders*, at 110. If the second rationale is proffered, the plaintiff must allege that an illegal factor was predominant or substantially the motivating factor, and that such an illegal factor was used "because of"[5] the employer or its policy. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 241, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The court determines that it need not determine which standard is appropriate because the court recognizes that plaintiffs Reed and Marquez have standing to challenge the Section 8014(3) preference under either standard.

The plaintiffs frame the loss of the right to compete as an injury distinct from the loss of their jobs. *See* Am.Compl. ¶ 7, 11. This is a valid distinction for the purposes of standing. In *Northeastern Florida Chapter of Associated General Contractors of America*, an association of contractors challenged an ordinance that "set aside" contracts for

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[5] The Supreme Court recognizes an affirmative defense. *See Texas v. Lesage*, 528 U.S. 18, 120 S.Ct. 467, 145 L.Ed.2d 347 (1999). In *Lesage*, the Court stated that if the entity or government actor enacts a program using race as a predominant criterion, then it is an affirmative defense that the actor would not have acted any differently, absent the challenged criterion. *See id.* Several lower courts have been using the *Texas v. Lesage* standard and applying it to standing. *See Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262, 1269 (11th Cir.2001); *Donahue v. City of Boston*, 183 F.Supp.2d 202, 208 (D.Mass.2001); *Boston's Children First v. Boston School Committee*, 183 F.Supp.2d 382, 393 (D.Mass.2002).

minorities and women. *See* 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586. The Supreme Court held that the "injury in fact" in an equal protection case is the denial of equal treatment resulting from imposition of the barrier that precluded the contractors from consideration of all contracting awards. *See id.* at 666, 113 S.Ct. 2297. Thereafter, the Court ruled that a party challenging a set- aside program need only show that a discriminatory policy prevents the entity or person from competing on an equal basis and that the entity or person is "able and ready to bid on contracts." *See id.* This circuit employed similar reasoning in *Dynalantic Corp. v. Department of Defense*, 115 F.3d 1012 (D.C. Cir.1997). There, a defense contractor challenged the race-based set- asides in Section 8(a) of the Small Business Act, as amended 15 U.S.C. §§ 637 *et seq. See id.* The D.C. Circuit held that being deprived of an opportunity to compete for the set-aside contracts "clearly makes out an injury" for standing purposes. *See id.* at 1016.

Along this line of reasoning, there is a distinct and palpable injury alleged here because absent the operation of Section 8014(3), the Air Force would have conducted an MEO analysis, effectively comparing the "in-house" bid with that of the private contractor's bid, thereby not precluding the plaintiffs from the opportunity to compete. *See* Am.Compl. ¶ 29. In other words, the operation of the subject statute ultimately deprived the plaintiffs of the opportunity to compete whereby they otherwise could have been eligible to retain their employment at Kirtland Air Force Base. *See* Am.Compl. ¶¶ 7, 11. As such, the operation of Section 8014(3) and subsequent preclusion of competing for the award of the civil engineering contract is directly traceable to the governmental conduct at issue, i.e., the Air Force's award of that civil engineering contract to *Chugach*. Thus, the plaintiffs meet the traceability prong of standing. *See Warth*, 422 U.S. at 504, 95 S.Ct. 2197; *National Maritime Union*, 824 F.2d at 1228. Turning to the next prong of standing, the

individual plaintiffs sufficiently demonstrate that the alleged injury is likely to be redressed by a favorable decision of this court. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130; *Tozzi*, 271 F.3d 301.

The plaintiffs ask the court to declare Section 8014(3) unconstitutional. Indeed, this court has the authority to enjoin defendants from using Section 8014(3), if deemed unconstitutional. Following this line of reasoning, the court may further direct restoration of the status quo prior to the direct conversion. *See id.* This would conceivably reinstate the civil engineering functions of the individual plaintiffs, not to mention all those individuals vicariously represented by plaintiffs *AFGE*. *See id.* In sum, the individual plaintiffs meet their burden of establishing all three elements of standing sufficient to invoke this court's jurisdiction, thus allowing these plaintiffs to proceed with their cause of action.

2. The Court Determines That Plaintiffs AFGE Have Representational Standing to Assert Their Claim

Plaintiffs AFGE assert that they meet the organizational or representational standing requirements. Plaintiffs *AFGE* satisfy the first prong in that both individual plaintiffs Reed and Marquez have established standing to sue in their own right, as discussed previously. *See Friends of the Earth*, 528 U.S. at 181, 120 S.Ct. 693. Turning to the second and third requirements for organizational standing, the representational plaintiffs also argue that this suit raises a pure question of law, i.e., whether Section 8014(3) is an impermissible race-based preference in violation of the Fifth Amendment, which can be litigated without the participation of each of the organization's individual members. *See id.* at 29. The defendants contend *AFGE* does not have standing in a representational capacity by arguing that neither plaintiffs Reed nor Marquez have standing. *See* Defs.' Mem. in Supp.

of Mot. for Summ.J. at 6. As the foregoing reflects, the court has already determined that plaintiffs Reed and Marquez do have standing to assert their claim.

The court agrees with plaintiffs *AFGE*'s argument that they have standing to assert their claim on behalf of their members through their representational capacity. The court now evaluates the second and third prongs of representational standing against the given facts. The Supreme Court's test for representational standing, as stated in *Friends of the Earth*, was recently applied by the D.C. Circuit in *Fund Democracy, LLC v. Securities and Exchange Comm'n*, 278 F.3d 21 (D.C.Cir.2002). In *Friends of the Earth*, an environmental group brought suit against a holder of a permit. *See Friends of the Earth*, 528 U.S. at 184, 120 S.Ct. 693. The permit allowed a threshold discharge of pollutants into surrounding water. *See id.* The group maintained that the holder of the permit violated the permit's discharge limits. *See id.* The Court determined that the individuals had standing to sue in their own right, so the only matter regarding standing was that of the organization. *See id.* Moving to the remaining prongs, the Court noted that the interest in protecting the water was germane to the organization's purpose, which was limiting the discharge of pollutants into surrounding waters. *See id.* The Court further recognized that the protection of that interest did not require all members to join in the suit. *See id.*

Just as the Court looked to the central purpose of the organization in *Friends of the Earth*, this court also looks to the central purpose of AFGE. One of the central purposes of AFGE is the protection of its members from perceived constitutional violations. *See* Am.Compl. § 3. Indeed, the representational plaintiffs assert that protecting the constitutional rights of federal employees in their dealings with their employer is unquestionably central to the organizations' purpose since AFGE, among other things, negotiates

collective bargaining agreements, arbitrates grievances, files unfair labor practices and litigates employees' constitutional and statutory rights in federal, state, and administrative fora on behalf of its members. *See* Pls.' Mem. in Supp. of Mot. for Summ.J. at 28. That function satisfies the second prong of the test, which is germaneness to the organization's purpose. *See Friends of the Earth*, 528 U.S. at 181, 120 S.Ct. 693; Hunt, 432 U.S. at 342-43, 97 S.Ct. 2434; Fund Democracy, 278 F.3d at 25. The third prong is also satisfied because, just like the plaintiff in *Friends of the Earth*, plaintiffs AFGE do not need each of their members to participate in this action to enjoin the use of Section 8014(3) nor for the court to adjudicate Section 8014(3)'s constitutionality. *See Friends of the Earth*, 528 U.S. at 184, 120 S.Ct. 693. Consequently, AFGE, in its representational capacity, satisfies *Article III*'s prerequisites for a justiciable case. *See Citizens for a Better Env't*, 523 U.S. at 102, 118 S.Ct. 1003. Since the threshold question of standing has been resolved in favor of the plaintiffs, the court proceeds to adjudicate the merits of the plaintiffs' claims by applying the appropriate standard for summary judgment. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (holding that the respondent failed to establish standing that would confer the court's jurisdiction).

C. The Court Applies Rational Basis Scrutiny to Section 8014(3)

Count One of the amended complaint alleges a violation of the equal protection component of the Fifth Amendment's Due Process Clause. *See* Am.Compl. ¶ 33. Before applying the appropriate legal standard of review to the given facts, tracing the development of jurisprudence in this area provides some guidance in evaluating why the rational basis standard applies in this case and why Section 8014(3) is constitutionally sound. In a case of this variety, which does not specifically involve a state's action, a court must look to the

Fifth Amendment's proscription. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Although the Fifth Amendment does not provide as explicit a guarantee of "equal protection" as does the Fourteenth Amendment, our Supreme Court has understood the Fifth Amendment's "due process" to afford protection against the same arbitrary treatment that can be instituted by the federal government. *See id.*

Early due process analysis involved legislation which discriminated based on factors other than race. The Supreme Court held that interests affected by those statutes were not subject to constitutional protection because "[u]nlike the Fourteenth Amendment, the Fifth [Amendment] contains no equal protection clause." *See Detroit Bank v. United States*, 317 U.S. 329, 337, 63 S.Ct. 297, 87 L.Ed. 304 (1943) (holding statute authorizing unrecorded tax lien and withholding lien against innocent purchasers, transferred *inter vivos*, could not violate equal protection because the Fifth Amendment does not entail an equal protection guarantee); *LaBelle Iron Works v. United States*, 256 U.S. 377, 392, 41 S.Ct. 528, 65 L.Ed. 998 (1921) (holding that cases decided under the Fourteenth Amendment have no application to federal taxes).

In 1954, the Court settled once and for all the question of whether the Constitution imposes a lesser restriction on the states than on the federal government. In the context of desegregation of public schools, the Court concluded that since the Constitution prohibited the states from maintaining racially segregated schools, it would be "unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *See Bolling*, 347 U.S. at 500, 74 S.Ct. 693. The Court echoed "'that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.'" *Id.* at

499, 74 S.Ct. 693 (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 40 L.Ed. 1075 (1896)). A majority of the Supreme Court has confirmed that "[t]he Court's application of that general principle to the case before it, and the resulting imposition on the federal government of an obligation equivalent to that of the States, followed as a matter of course." *See Adarand Const., Inc. v. Pena*, 515 U.S. 200, 216, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Thus, cases interpreting equal protection under the Fourteenth Amendment apply to this area of equal protection under the Fifth Amendment.

The first step of the analysis begins with the determination of the appropriate standard of review. The parties are at polar opposite ends of the spectrum when they assert the level of review applicable to Section 8014(3). The plaintiffs contend that the classification should be subject to strict scrutiny because it is unconstitutionally race-based on its face. *See* Pls.' Mem. in Supp. of Mot. for Summ.J. at 29. This assertion suggests that Native American or Native Alaskan is solely an identified race and is only used in earmarking a race of persons. The defendants argue that rational basis applies herein since the subject classification is political in nature rather than based on race. *See* Defs.' Mem. in Supp. of Mot. for Summ.J. at 19. Intervenor-defendants Chugach also join the defendants' assertion that rational basis applies to the instant classification. *See* Int.-Defs.' Mem. in Supp. of Mot. for Summ.J. at 10. The court agrees with the position taken by the defendants and the intervenor-defendants and applies the rational basis standard of review to Section 8014(3).

The plaintiffs rather forcefully argue that the preference under Section 8014(3) is race-based and that the Supreme Court's line of cases under "benign" discrimination govern this issue. *See* Pls.' Mem. in Supp. of Mot. for Summ.J. at 32. *Cf. Adarand*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (asserting that all classifications based on race are subject

to strict scrutiny review). The plaintiffs further argue that the classification fails because it is not the most narrowly tailored to serve a compelling governmental interest. *See* Pls.' Mem. in Supp. of Mot. for Summ.J. at 29-30. In addition, the plaintiffs allege that the exemption does not seek to redress past discrimination, which is recognized as a compelling interest under settled law. *See id.; Adarand*, 515 U.S. at 237, 115 S.Ct. 2097. In fact, they allege the statute is unconstitutional on its face because the legislative history[6] lacks reasons for Section 8014(3)'s enactment and, thus, "its benefits may even extend to non-Native American partners who own up to 49% of the contracting firm." Pls.' Mem. in Supp. of Mot. for Summ.J. at 31-33. The plaintiffs also explore the view that there is "no basis" to conclude Section 8014(3) is restricted to tribal entities. *See id.* at 34.

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[6] The Court has stated that "canons [of statutory interpretation] are [guides] designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force." *Chickasaw Nation v. United States*, 534 U.S. 84, 122 S.Ct. 528, 534, 151 L.Ed.2d 474 (2001). The court recognizes that evidence of congressional intent via its legislative history is not a requisite but may be a tool in some instances. Even later history may provide guidance of that intent. *See J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Intern., Inc.*, 534 U.S. 124, 122 S.Ct. 593, 608, 151 L.Ed.2d 508 (2001) (looking to later history of a second statute in order to glean legislative intent). This court also acknowledges that it must "construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." *United States v. Five Gambling Devices*, 346 U.S. 441, 448, 74 S.Ct. 190, 98 L.Ed. 179 (1953). Furthermore, this court notes that another canon of statutory construction embraces the notion that statutes should be construed to avoid a possible unconstitutional result. *See Waterview Mngmnt. Co. v. FDIC*, 105 F.3d 696, 701 (D.C.Cir.1997); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346, 48 S.Ct. 194, 72 L.Ed. 303 (1928); *United States v. Rumely*, 345 U.S. 41, 45, 73 S.Ct. 543, 97 L.Ed. 770 (1953). Since rational basis review applies to Section 8014(3), the statute passes constitutional muster.

The defendants contend—and the court agrees—that the preference is subject to rational basis scrutiny because Section 8014(3) encompasses a political, rather than a race-based classification. The defendants cite a plethora of justifications. Among them are Congress's constitutionally derived power from the Indian Commerce and Treaty Clause of Article II and the legislative arm's unique authority to legislate on behalf of tribally affiliated Indians as a politically-defined group. *See* Defs.' Mem. in Supp. of Mot. for Summ.J. at 13. The Constitution provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. Thus, the Constitution itself, commits the power to regulate commerce with the Indian tribes to the legislative arm of the federal government. *See id.* Notably, the defendants also avow that the Section 8014(3) exemption, which facilitates contracting with Native American owned firms, furthers the federal policy of Indian self-determination, the United States's trust responsibility, and the promotion of economic self-sufficiency among Native American communities. *See* Defs.' Mem. in Supp. of Mot. for Summ.J. at 21.

Indeed, the court notes that Congress has established programs and benefits for the education of tribal members in an effort to ameliorate high rates of illiteracy among Native American populations. *See, e.g.*, Indian Self- Determination and Education Assistance Act, as amended 25 U.S.C. §§ 450-458; Tribally Controlled Community College Assistance Act, as amended 25 U.S.C. §§ 1801-1852. Congress has also enacted statutes to provide health services and to construct safe water-supply and water-disposal systems for Native American homes and communities. *See, e.g.*, Indian Health Care Improvement Act, as amended 25 U.S.C §§ 1601 *et seq.* Federally recognized tribes benefit from other special general assistance and child welfare programs as well, including the

Food Stamp Program, as amended 7 U.S.C. §§ 2011-2036, and the Indian Child Welfare Act, as amended 25 U.S.C. §§ 1901-1963.

Intervenor-defendants *Chugach's* argument virtually mirrors that of the Air Force. They ultimately conclude that Section 8014(3) is a reasonable way to fulfill the government's obligation as trustee and to assist in Native American self-determination. *See* Int.-Defs.' Mem. in Supp. of Mot. for Summ.J. at 38. *Chugach's* brief also fully develops and explores the lengthy historical perspective in which the enactment of Section 8014(3) is set, including the special duty to Native Americans. *Chugach* then argues that the Section 8014(3) preference needs to be understood in the context of the enactment, that is, a mechanism to promote the financial success of Native corporations in accordance with the Alaska Native Claims Settlement Act ("ANCSA"), the Treaty of Cession and Congress's special trust responsibility to Native Alaskans. *See id.* at 39. Admittedly, all of Title 25 of the United States Code is dedicated to Indian legislation. *See* 25 U.S.C.

Both the defendants and the intervenor-defendants claim that the *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), line of precedent controls the outcome in this case rather than the *Adarand* line of precedent. *See* Defs.' Mem. in Supp. of Mot. for Summ.J. at 23; Int.-Defs.' Mem. in Supp. of Mot. for Summ.J. at 31. *Mancari* involved a constitutional challenge asserted by non-Native American federal employees against a federal statute that established a preference in favor of Native Americans in the filling of job vacancies in the Bureau of Indian Affairs. *See Mancari*, 417 U.S. at 539, 94 S.Ct. 2474. They alleged, among other things, that the challenged statute deprived them of property rights in violation of the Fifth Amendment's due process component. *See id.* A three-judge district court ruled that the statute was impliedly repealed by the 1972 Equal

Employment Opportunity Act, as amended 42 U.S.C. § 2000e-16(a). *See id.* at 540, 94 S.Ct. 2474. The Supreme Court reversed the lower court's ruling and held that Congress did not intend to repeal the Native American preference. *See id.* at 551, 554-55, 94 S.Ct. 2474.

The plaintiffs claim that even if *Mancari* is controlling here, it is limited by *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (declaring a law limiting the ability to vote as an unconstitutional bar in violation of the Fifteenth Amendment). The defendants argue, however, that the plaintiffs' attempt to limit *Mancari* is unconvincing because *Rice* does not apply to the instant case. The court agrees with the defendants. *Rice*[7] only dealt with the right to vote, which is a fundamental right evoking strict scrutiny review. *See Rice*, 528 U.S. at 498-99, 120 S.Ct. 1044. Moreover, *Rice* involved neither a Fifth Amendment due process claim nor a Fourteenth Amendment equal protection claim. *See id.*

The court also agrees with the defendants' and intervenor-defendants' argument that Section 8014(3) is not race-based. A reading of that statute lends great credence to the argument that the *Mancari* line is the governing law. *Adarand* dealt with 'race-based' classifications while *Mancari* dealt with a 'political' classification arising from a long history regarding Native Americans and our country's unique duty toward them. *Compare Adarand*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158, with *Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290. More importantly, *Mancari* specifically considered Native Americans as a political classification. *See Mancari*, 417 U.S. at 548, 554, 94 S.Ct. 2474. (observing that

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[7] The court notes that the definition of "Native" as used in the ANCSA was cited as an example of a constitutionally valid tribal definition in the joint concurrence of Justices Breyer and Souter in *Rice*. *See Rice*, 528 U.S. at 525, 120 S.Ct. 1044.

"Indians [are] not . . . a discrete racial group, but, rather, . . . [are] members of quasi- sovereign tribal entities"). As such, the appropriate level of scrutiny applicable to Section 8014(3) is rational basis and the delineation must be rationally related to a legitimate governmental purpose. *See Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290; *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1340 (D.C.Cir.1998) (applying rational basis scrutiny to a constitutional challenge of an amendment to the Rhode Island Claims Settlement Act). Here the government seeks to fulfill its unique trust obligations and promote self-determination and self-governance of Native-Americans. *See* Defs.' Mem. in Supp of Mot. for Summ.J. at 21.

Just last year the D.C. Circuit affirmed a case involving the United States's trust obligation. *See Cobell v. Norton*, 240 F.3d 1081 (D.C.Cir.2001). The D.C. Circuit recognized that our country's expansion resulted in relocation and removal of many tribes by means of treaty and force. *See id.* at 1088; *e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831) (holding that the history of the United States shows that the Cherokee Nation is a foreign state competent to maintain suit against Georgia). The D.C. Circuit then traced the government's changing policy after assimilation efforts failed. *See id.* These efforts ranged from unsuccessful attempts at terminating the trust relationship to the "current policy of 'self determination and self governance.'" *See id.* at 1088 (*quoting Cobell v. Babbitt*, 91 F.Supp.2d 1, 9 (D.D.C.1999) (declaring that the Secretary of the Treasury breached his fiduciary duties)); *Alaska Chapter, Associated Gen. Contractors of Am., Inc. v. Pierce*, 694 F.2d 1162 (9th Cir.1982) (recognizing that the guardian-ward relationship arose because of the Indian tribes' subordination of sovereignty for protection of the government). In addition, and as stated before, the Supreme Court addressed an equal protection challenge to a statute that created an employment preference in the Bureau of Indian Affairs. *See Mancari*, 417

U.S. at 548, 94 S.Ct. 2474. As described earlier, the Court also looked to the history of the United States's relations with the Indian tribes and held that the employment preference did not constitute 'racial discrimination' and was not even a 'racial' preference. *See id.* at 553, 94 S.Ct. 2474. Since the preference applied only to members of federally recognized tribes, it was rationally related to the fulfillment of the United States's unique trust responsibility that is committed to the Congress by the Constitution. *See id.* at 555, 94 S.Ct. 2474.

D. The Court Determines that Section 8014(3)'s Preference is Constitutional and Does Not Violate Equal Protection Because it is a Reasonable Mechanism Aimed at Fulfilling Congress's Special Obligations to Alaska Natives Who Have Been Afforded the Same Treatment as Native Americans for Constitutional and Legislative Purposes

Section 8014 provides in relevant part, that no funds:

> shall be available to convert to contractor performance an activity or function of the Department of Defense that . . . is performed by more than 10 Department of Defense civilian employees until a most efficient and cost effective organization analysis is completed on such activity or function . . . Provided, that this section and subsections (a), (b), and (c) of 10 U.S.C. 2461 shall not apply to a commercial or industrial type function of the Department of Defense that . . . (3) is planned to be converted to performance by a qualified firm under 51 per centum Native American ownership.

*See* § 8014(3) of the Defense Appropriations Act for Fiscal Year 2000, P.L. 106-79, 113 Stat. 1212, 1234 (1999). To understand why this section is constitutional on its face and as applied, it is important to understand the history and the

reasons behind the formation of firms such as those formed by the intervenor-defendants *Chugach*, to whom the contract was awarded.

Congress derives its authority to legislate under the Indian Commerce Clause regarding Alaska Natives from the Treaty of Cession with Russia.[8] *See* 15 Stat. 539. That authority reflects the historical existence of Alaska Natives as members of sovereign communities. *See Native Village v. Alaska*, 944 F.2d 548, 558 (9th Cir.1991) (applying *United States v. Wheeler* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978)) (requiring Alaska to give full faith and credit to child custody determinations made by tribal courts of the native villages). Thus, Alaska Native groups are afforded the same treatment as Indian tribes for constitutional and legislative purposes. *See Pierce*, 694 F.2d at 1168 n. 10 (upholding Alaska Native preference and citing *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918) (holding that statutes passed for the benefit of Indian tribes or communities are to be liberally construed and doubtful expressions resolved in favor of the Indians)). This includes

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[8] In 1867 Russia ceded to the United States, "all the territory and dominion now possessed (by Russia) on the continent of America and in the adjacent islands." *See* 15 Stat. 539 (Mar. 30, 1867). Article III of the Treaty states:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years, but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. . . . The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

15 Stat. 542. The cession was effectively a quitclaim. It is undisputed that the United States thereby acquired whatever dominion Russia had possessed immediately prior to cession. *See United States v. Alaska*, 422 U.S. 184, 192 n. 13, 95 S.Ct. 2240, 45 L.Ed.2d 109 (1975).

their self-determination and economic self-sufficiency. In *Pierce*, the Ninth Circuit also recognized that "Congress has utilized methods other than tribal rolls or proximity to reservations which have generally been used as eligibility criteria in statutory programs for the benefits of Indians." *Pierce*, 694 F.2d at 1168 n. 10.

Although "[t]reaties . . . were originally the primary instrument for the expression of this relationship," in the modem era "[f]ederal laws like [S]ection 8014 are the means by which the United States carries out its trust responsibilities and the [f]ederal policy of self-determination and economic self-sufficiency." Amendment No. 3319, 146 Cong.Rec. S5019 (daily ed. June 13, 2000). The ANCSA[9] is one such modem mechanism that designates Native Alaskan Corporations as the vehicle used to provide continuing economic benefits in exchange for extinguished aboriginal land rights. *See Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 997 (9th Cir.1994). Intervenor-defendants *Chugach* are two such firms formed under the auspices of the ANCSA. *See* Defs.' Mem. in Supp. of Mot. for Summ.J. at 31.

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[9] In 1971, Congress enacted the ANCSA to settle the aboriginal claims of Alaska Natives to the land and resources of the State of Alaska. *See* 43 U.S.C. § 1601 *et seq.* The ANCSA requires the Secretary of the Interior to divide Alaska into 12 regions and the Natives of each region are required to form for-profit corporations under Alaska law. *See* 43 U.S.C. § 1606(a), (d). Each Native Alaskan "enrolled" in a region receives 100 shares of the Regional Corporation. *See id. Chugach* Alaska Corporation, the parent of intervenor-defendants herein, is the Regional Corporation for south-central Alaska. *See* 43 U.S.C. § 1606(a)(9). Only Native Alaskans can sit on the board of an Alaska Native Corporation and, until 1991, shares were not alienable except among Native Alaskans. *See* 43 U.S.C. § 1606(f). The purpose of this system is to foster self-determination and financial independence among the Alaska Natives. *See* H.R.Conf.Rep. 92-746, 92d Cong., 1st Sess., 37, repr. in 1971 U.S.C.C.A.N. 2247, 2250; *City of Angoon v. Marsh*, 749 F.2d 1413, 1414 (9th Cir.1984) (recognizing that the purpose of the ANCSA is to assist Alaska Natives in achieving financial independence and self-sufficiency).

The court next examines the relationship between the ANCSA and Section 8014(3)'s application to Native Americans. On the face of Section 8014(3), there is no definition of exactly what is meant by "Native American." The subsequent legislative history, however, reflects a clarification by Congress for that term to take on the meaning of "ownership by an Indian tribe, as defined in 25 U.S.C. [§]450[b](e)." *See* Amendment No. 3319, 146 Cong.Rec. S4961 (daily ed. June 12, 2000); P.L. 106-259, 114 Stat. 656, 677 (2000). Therefore, Section 8014(3) only applies to those Indian tribes so designated by 25 U.S.C. § 450b(e) and includes "any Alaska . . . village corporation as defined in or established pursuant to [the ANCSA]." *See* 25 U.S.C. § 450b(e). The court's ability to accept the subsequent definition turns on whether Section 8014(3) was enacted with the required Congressional power.[10] *See United States v. Cohen*, 733 F.2d 128, 139 (1984). Once that predicate is shown, the rational basis standard applies. *See id.*

First, the Supreme Court has stated that subsequent legislation is entitled "great weight in statutory construction." *See Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 380, 89 S.Ct. 1794, 23 L.Ed.2d 371

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[10] In applying Supreme Court precedent in the D.C. Circuit, Justice Scalia, then Circuit Judge Scalia, stated:

> "[I]n a sense the Constitution itself establishes the rationality of the present classification, by providing a separate federal power. . . . As the Supreme Court has said in rejecting equal protection challenges to legislation affecting a group which . . . might otherwise qualify as a 'suspect class': [T]he Constitution itself provides support for legislation directed specifically at the Indiantribes. . . . [T]he Constitution therefore 'singles Indians out as a proper subject for separate legislation.'"

*United States v. Cohen*, 733 F.2d 128, 139 (1984) (holding no equal protection violation and that neither strict scrutiny nor intermediate scrutiny was applicable) (quoting from *Morton*, 417 U.S. at 552, 94 S.Ct. 2474).

(1969) (holding that legislation declaring intent of earlier statute is entitled to great weight in statutory construction). Second, Congress acted within its power when it enacted the current statute under which the intervenor-defendants were formed. The ANCSA is a tool to help Alaska Natives attain their economic self-sufficiency, eventually allowing Congress the leeway to relinquish its trust obligation. *See Koniag*, 39 F.3d at 997. The ANCSA states that "[n]otwithstanding any other provision of law, Alaska Natives shall remain eligible for all Federal Indian programs on the same basis as other Native Americans." 43 U.S.C. § 1626(d). The Section 8014(3) preference operates to favor 51 percent Native American owned firms, which is a political classification subject to rational basis scrutiny. *See Mancari*, 417 U.S. at 554, 94 S.Ct. 2474.

The evidence presented reflects that Congress enacted the exemption for the benefit of those Native Americans who are affiliated with tribal entities as denoted by Congress. Not only is there history of affording special treatment to Alaska Natives, but also, following a report by the Alaska Federation of Natives ("AFN"), Congress found the need to form a commission, the Joint Federal-State Commission on Policies and Programs Affecting Alaska Natives. *See* P.L. 101-379, § 12(b). After holding 15 regional hearings and two state-wide hearings, the commission issued its Final Report in May 1994. *See* P.L. 104-270 § 1(2). The commission's final report was consistent with the AFN's conclusions that there was a need for more jobs and economic opportunities because there was a lack of economic development opportunities for Native Americans. *See Alaska Native Commission Report Joint Oversight Hearing*, S. and H.Hrg. No. 104-52, 104th Cong., 1st Sess., at 8-9 (Nov. 16, 1995). This was done by promoting economic development, including a potential stream of revenues, that will ensure self-sufficiency for the corporation's Alaska Native shareholders. *See Pierce*, 694 F.2d at 1168 n. 10.

Pursuant to Section 8014(3), Congress has established a contracting shortcut for Native American-owned firms, which increases the likelihood of new business opportunities for them. As previously discussed, the August 2000 clarifying amendment to Section 8014(3) for Fiscal Year 2001 substituted "ownership by an Indian tribe, as defined in 25 U.S.C. 450(e), or a Native Hawaiian organization, as defined under 15 U.S.C. 647(a)(15)" for the term "Native American ownership." Amendment No. 3319, 146 Cong.Rec. S4961 (daily ed. June 12, 2000); P.L. 106-259, 114 Stat. 656, 677 (2000). This was in direct response to the filing of the case at bar.[11] *See* 146 Cong.Rec. S5019 (daily ed. June 13, 2000). Looking at Congress's intent is an aid in statutory interpretation, but has never been a requirement. *See Red Lion*,

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[11] MR. STEVENS:

> . . . It has come to my attention that a lawsuit has been filed challenging the Native American exception in section 8014(3) as a racially-based preference that is unconstitutional. That challenge is simply inconsistent with the well-established body of Federal Indian law and numerous rulings of the U.S. Supreme Court. The Native American exception . . . is intended to advance the Federal Government's interest in promoting self-sufficiency and the economic development of Native American communities. . . . While I believe that the provision is clear, we propose adoption of the amendment before us today to further clarify that the exception for Native American- owned entities in section 8014 is based on a political classification, not a racial classification.
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> Because my colleague was Chairman of the Subcommittee on Defense Appropriations in 1990 . . . I would like to know whether my understanding of the purpose and intent of section 8014 is consistent with the original purpose and intent. . . .
>
> MR. INOUYE:
>
> My chairman is correct. . . . Today, Federal laws like section 8014, are the means by which the United States carries out its trust responsibilities and the Federal policy of self determination and economic self-sufficiency.

*See* 146 Cong.Rec. S5019 (daily ed. June 13, 2000).

395 U.S. at 379, 89 S.Ct. 1794. Even though a court usually seeks prior history, subsequent history may illuminate the matter. *See Hagen v. Utah*, 510 U.S. 399, 420, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994) (utilizing subsequent history when interpreting a statute); *Red Lion*, 395 U.S. at 380, 89 S.Ct. 1794. In sum, the defendants and the intervenor-defendants succeed on the merits by proving that there is no genuine issue of material fact as to whether Section 8014(3) violates equal protection. *See* Fed.R.Civ.P. 56(c); *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. 2548; *Diamond*, 43 F.3d at 1540. "'On rational basis review . . . a statute [such as § 8014(3)] . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.'" *Calloway v. Dist. of Columbia*, 216 F.3d 1, 8 (D.C.Cir.2000) (*quoting Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). Thus, the court grants the defendants' and intervenor-defendants' respective motions for summary judgment. No reasonable trier of fact could find, looking at all the evidence, including the history, with all inferences in favor of the plaintiffs, that the United States's trust obligation and the self- determination of Native Americans are not reasonably accomplished by enacting the Section 8014(3) preference. *See Koniag*, 39 F.3d at 996-97.

Conversely, the plaintiffs fail to show that the Section 8014(3) mechanism is wholly irrational or arbitrary. This is especially clear in light of the fact that the reservation system is no longer effective in accomplishing Congress's legitimate goal. *See* 146 Cong.Rec. S5019 (daily ed. June 13, 2000); *cf. Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir.1997). Further, the ANCSA scheme is a tool that aids companies like *Chugach* in attaining economic self-sufficiency. *See City of Angoon*, 749 F.2d at 1414.The Congress needs room to function and, in the arena of Native American legislation, our Supreme Court has stated: "Of necessity the United States

assumed the duty . . . and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . ." *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715, 63 S.Ct. 920, 87 L.Ed. 1094 (1943). Furthermore, the Court has recognized that "[i]f these laws [singling out Native Americans], derived from historical relationships and explicitly designed to help only [Native] Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 814 n. 13 (E.D.Wash.1965), quoted in *Mancari*, 417 U.S. at 553, 94 S.Ct. 2474.

In looking at the evidence in the light most favorable to the plaintiffs, no reasonable trier of fact could find that Section 8014(3) is not a reasonable method for fulfilling Congress's special responsibilities to Alaska Natives. *See* 43 U.S.C. § 1601 *et seq.* In fact, the preference is constitutional because it is a reasonable tool to further these enumerated goals. *See id.; Marsh*, 749 F.2d at 1414. Consequently, the court denies the plaintiffs' motion for summary judgment and grants the defendants' motion for summary judgment, thereby granting the intervenor-defendants' motions for summary judgment as well.

E. The Court Grants the Defendants' and Intervenor-Defendants' Motions for Summary Judgment on Count Two, and Denies the Plaintiffs' Motion for Summary Judgment on Count Two Because There is No Substantive Due Process Right to Federal Employment

Count Two alleges the violation of substantive due process as guaranteed by the Fifth Amendment. *See* Am.Compl. ¶ 36. The Supreme Court is reluctant to announce new fundamental rights that invoke substantive due process protection and has

not stated that there is such a right to federal employment. Absent such precedent, the court declines to extend those rights for which there is no precedent. Through their alleged denial of a fundamental interest in federal employment, the plaintiffs attempt to trigger strict scrutiny analysis. *See* Pls.' Mem. in Supp. of Mot. for Summ.J. at 39. The defendants, however, oppose the plaintiffs' argument that strict scrutiny applies to the given facts. *See* Defs.' Mem. in Supp. of Mot. for Summ.J. at 10. The defendants also argue that there is no fundamental right to federal employment that would entitle the plaintiffs' loss of federal employment to substantive due process protection. *See id.* The intervenor-defendants concur with the defendants on this point. *See* Int.-Defs.' Mem. in Supp. of Mot. for Summ.J. at 37. The court agrees with the defendants' position since there is, indeed, no case law that recognizes a fundamental right to federal employment, only a procedural due process guarantee. *See Roth*, 408 U.S. at 589, 92 S.Ct. 2701. Therefore substantive due process analysis does not apply here. *See id.*

Nonetheless, as alluded to previously, there is a second component to due process analysis, otherwise referred to as procedural due process. *See id.* When an underlying law is subject to substantive due process analysis and survives strict scrutiny, it must also be implemented in a fair manner. *See id.* As such, the second proscription under the Due Process Clause of both the Fifth and Fourteenth Amendments is any measure that denies procedural due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Property interests are not generated by the Constitution, "[r]ather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577, 92 S.Ct. 2701 (holding that the respondent did not have a property interest—the substantive component—sufficient to require a hearing—the procedural

component—when the government declined renewal of his contract of employment). Since the plaintiffs have not raised a denial of procedural due process, the court need not raise that issue *sua sponte*. Therefore, the court enters summary judgment on Count Two for the defendants and the intervenor-defendants, and denies summary judgment as to the plaintiffs on Count Two.

## IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motion for summary judgment and grants the intervenor-defendants' motion for summary judgment on both Counts One and Two. Accordingly, the court denies the plaintiffs' motion for summary judgment on both Counts One and Two. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this 29 day of March 2002.

Supreme Court, U.S.
FILED
NOV 0 4 2003
OFFICE OF THE CLERK

No. 03-359

IN THE

# Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2263; ROSE REED; and INEZ MARQUEZ,
*Petitioners,*

v.

THE UNITED STATES OF AMERICA; JAMES G. ROCHE, in his official capacity as Secretary of the Air Force; CHUGACH MANAGEMENT SERVICES, INC.; and CHUGACH MANAGEMENT SERVICES JOINT VENTURE,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

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No. 03-359

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2263; ROSE REED; and INEZ MARQUEZ,
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Respondents Chugach Management Services, Inc. and Chugach Management Services Joint Venture respectfully oppose the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, on the following grounds.

## REASONS FOR DENYING THE PETITION

### 1. The Petition Presents A Purely Facial Challenge And Seeks A Purely Facial And Hypothetical Resolution.

Petitioners acknowledge that their challenge is a purely facial challenge and that they seek a purely facial and hypothetical resolution. *See* Petition at 8 ("The § 8014 preference on its face grants preferential treatment to Native American contractors . . . ."; The court of appeals nevertheless upheld the facially race-based preference . . . .").[1] In doing so, Petitioners disregard two key principles of constitutional adjudication that refute their bald claim of entitlement to facial and nonfact-based review and determination. The Court of Appeals well articulated the first principle, that persons attacking a statute as unconstitutional must show that the statute is unconstitutional as to *them*:[2]

> Although the Kirtland § 8014(3) contract was awarded to a firm wholly owned by federally recognized Indian tribes, plaintiffs want us to decide that the provision is unconstitutional because, in FY 2000, it authorized preferences not only for Indian tribes but also for firms owned by Native Americans who were not tribal members and who owned no more then 51 percent of the firm. Plaintiffs thus want to expand this case well beyond its factual context. Prudence, as reflected in a longstanding rule of constitutional adjudication, counsels

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[1] Petitioners suggest that "the court below . . . read the Act as creating a racial preference." Petition at 6. That suggestion is simply wrong. Quite the contrary, the Court of Appeals found that § 8014(3) allowed for its application to federally recognized Indian tribes and was applied constitutionally in that manner. *Am. Fed'n of Gov't Employees v. United States*, 330 F.3d 513, 518-19 & 523 (D.C. Cir. 2003), Appendix to Petition ("Pet. App.") at 5a-6a & 13a.

[2] In this case, Petitioners could not show that the statute was unconstitutional as to anyone in any actual circumstance.

> otherwise. The Supreme Court summarized the rule in *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960): "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." The Court reiterated the point in *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830 (1973): "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."

*Am. Fed'n of Gov't Employees*, 330 F.3d at 518, Pet. App. at 5a-6a.[3]

The second principle, consistent with the first but which the Court of Appeals found it unnecessary to apply, is that a court's responsibility is to construe a statute so as to find it constitutional or to avoid the constitutional issue altogether. *See American Foreign Service Ass'n v. Garfinkle*, 490 U.S. 153, 161 (1989); *United States v. Rumely*, 345 U.S. 41, 45 (1953). The District Court acknowledged this responsibility. *See Am. Fed'n of Gov't Employees v. United States*, 195 F. Supp.2d 4, 17-18 n.6 (D.D.C. 2002).

Petitioners, however, eschew these principles of constitutional adjudication, constitutional narrowing and constitutional construction. Contrary to the unsupported departure from firm tenets of constitutional adjudication that Petitioners

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[3] In *Raines*, citing *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885), this Court reiterated other constitutional cautions including that courts are "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.'" *Raines*, 362 U.S. at 21.

seek, the Court of Appeals correctly followed the path this Court established. *See Raines*, 362 U.S. at 26:

> the . . . Court seems . . . to have recognized . . . that the statute, if applicable only to this class of cases, would unquestionably be valid legislation under that Amendment. We think that under the rules we have stated, that court then should have gone no further and should have upheld the Act as applied in the present action . . . .[4]

**2. There Is No Ongoing Controversy. The Petition Seeks A Purely Advisory Opinion As To Past Events And Decisions.**

As the Court of Appeals correctly noted, Fiscal Year 2000 § 8014 was a one-year-only, and now is a lapsed, statute. Thus, the circumstances of the case are incapable of repetition. Petitioners ask this Court, nevertheless, to reach back in time to adjudicate this dead statute on its face. That is, Petitioners ask the Court to render an advisory opinion that can have no palpable, actual effect on this law. Petitioners offer no support for this request.

Furthermore, because § 8014 never has been, and never will be, applied in an unconstitutional manner (*see* Point 3 below), Petitioners' request is wholly attenuated from, and cannot result in a determination of, a real constitutional

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[4] Even in the area of First Amendment rights, where the Court sparingly has noticed a narrow exception to this rule, the exception would not operate to strike down statutes as a whole as Petitioners seek, but rather only partially to excise wholly unconstitutional applications not susceptible to a limiting construction. *See Broadrick*, 413 U.S. at 612-14. This First Amendment exception does not apply here. Even, however, if the Court were inclined to create a new exception comparable to that found in First Amendment cases, § 8014(3) would survive intact as it is susceptible to a limiting, constitutional construction, as the District Court found (but which the Court of Appeals did not deem necessary to reach). *See Am. Fed'n of Gov't Employees*, 195 F.Supp.2d at 17-19 & n. 6; *Am. Fed'n of Gov't Employees*, 330 F.3d at 517-18, Pet. App. at 4a-5a.

dilemma. Likewise, there is no prospect that § 8014 will be applied in a manner that actually will impair a person's constitutional rights, whether that person be party to this suit or not. *See Raines*, 362 U.S. at 22. Without a live statute or an ongoing prospect for controversy, there is no cause for Supreme Court review.

Nor can Petitioners point to any other controversy outside the instant one that would be resolved by Court review of this case. Petitioners do not cite, and neither the courts below nor the parties cited, any other statute or controversy raising a similar issue. Thus, this case does not present any broader reasons for Supreme Court review.

Rather, as Petitioners forthrightly confirm, they seek not a present-day or forward-looking decision, but rather to revisit a past decision. They ask the Court to take this case as an "opportunity to clarify that *Mancari* is confined to legislation dealing with federally recognized Indian tribes as sovereign entities or with matters that affect uniquely Indian interests." Petition at 8, referring to *Morton v. Mancari*, 417 U.S. 535 (1974). That is not a proper grounds for *certiorari*, but even were it proper grounds, the request does not arise from, and is unnecessary to, this case. The Court of Appeals did not engage in, or even suggest, a contrary reading or application of *Mancari*. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 520-21, Pet. App. at 9a-11a, including the following:

> Whatever the significance of the *Mancari* dictum—the Court said the case would be "more difficult," not that the blanket exemption would be unconstitutional—the question before us is not in the "difficult" category. The critical consideration is Congress' power to regulate commerce "with the Indian tribes."

Nor did the Court of Appeals' actual holding depart from *Mancari*:

> We therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional.

*Am. Fed'n of Gov't Employees*, 330 F.3d at 522-23, Pet. App. at 13a.

### 3. The Government Applied § 8014 Constitutionally.

A key tenet in constitutional adjudication of laws of this nature is that their review is *as applied*, in concrete factual circumstances. *See Mancari*, 417 U.S. at 554: "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." Beyond the facial challenge to the statute, the petition does not challenge the Government's application of § 8014. Nor, because of FY 2000 § 8014(3)'s expiration and deliberate clarification in later years (*see* below), is there any realistic prospect that the Government ever would or could apply § 8014(3) unconstitutionally. In fact, the Government did apply § 8014 constitutionally, in its one and only application, to tribal organizations. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 518-19 & 523, Pet. App. at 5a-8a & 13a.[5] In the words of *Mancari*, § 8014 "as applied, is . . . to

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[5] The United States has recognized the tribal status and the tribal eligibility of Alaska Natives since they came within the jurisdiction of the United States. *See* Treaty of Cession with Russia of March 30, 1867, 15 Stat. 539, 1867 WL 7659 (TIA), by which the United States acquired Alaska. Art. III of the Treaty provides (emphasis added):

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years, but if they should prefer to remain in the ceded territory, they, *with the exception of uncivilized native tribes*, shall be admitted to the enjoyment of all rights, advantages and immunities of citizens of

Indians . . . as members of quasi-sovereign tribal entities." 417 U.S. at 554.[6]

*Rice v. Cayetano*, 528 U.S. 495 (2000), does not vitiate the Court of Appeals' (and the District Court's) focus on the one, constitutional application of § 8014 to a legitimate tribal organization. In *Rice*, the statute at issue had not been applied constitutionally and was not susceptible to a constitutional application. *See id.* at 519; & at 524-25 (Breyer, J., concurring). Here, in contrast, the statute was both constitutionally applied and open to a constitutional construction. Thus, *Rice* does not negate the Court of Appeals' analysis: because the Government awarded the Kirtland contract to a tribal organization under a statute applicable to tribal organizations, the rational basis test applied.

An important distinction as well is that the statute challenged in *Rice* directly contravened the fundamental right to vote specifically protected by the Fifteenth Amendment, while § 8014 directly encouraged and advanced commercial activity authorized by the Indian Commerce Clause of the

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> the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. *The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.*

[6] The petition gives only grudging acknowledgment to almost two centuries of established case law upholding legislation applicable to Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (Marshall, C.J.): The United States-Indian relationship is "perhaps unlike that of any two people in existence [and is] marked by peculiar and cardinal distinctions which exist nowhere else." Petitioners state, "[S]ome political preferences for Native American tribes may be permissible despite their racial component . . . ." Petition at 7. Notwithstanding this dismissive recognition, Petitioners do not cite any case in which such legislation has been found unconstitutional as race based. The absence of such cases in Petitioners' papers, both in this court and below, evidences the fact that there is no such decision.

Constitution, U.S. Const. art. I, § 8, cl. 3. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 522-23, Pet. App. at 13a.

Additionally, subsequent legislative history on Fiscal Year 2001 § 8014, accompanying a clarification of § 8014(3) in response to Petitioners' suit, confirms both the statute's constitutionality and the correctness of the Court of Appeals' decision:

> MR. STEVENS. . . . The exception for a private contractor that is a Native American-owned entity is an exercise of the authority that has been vested in the Congress by the U.S. Constitution in Article I, Section 8, Clause 3, often referred to as the Indian Commerce Clause. . . . [T]his is by no means the only Federal legislation that recognizes the special status of Native Americans in commercial transactions with the Federal Government which is based upon the trust relationship the United States has with its indigenous, aboriginal people. . . .
>
> It has come to my attention that a lawsuit has been filed challenging the Native American exception in section 8014 as a racially-based preference that is unconstitutional. That challenge is simply inconsistent with the well-established body of Federal Indian law and numerous rulings of the U.S. Supreme Court. The Native American exception contained in section 8014 is intended to advance the Federal Government's interest in promoting self-sufficiency and the economic development of Native American communities. It does so not on the basis of race, but rather, based upon the unique political and legal status that the aboriginal, indigenous, native people of America have had under our Constitution since the founding of this nation. It is a valid exercise of Congress' authority under the Indian commerce clause. While I believe that the provision is clear, we propose adoption of the amendment before us today to further clarify that the exception for Native

American-owned entities in section 8014 is based on a political classification, not a racial classification.

Because my colleague was Chairman of the Subcommittee on Defense Appropriations in 1990 and involved in the drafting of section 8014, I would like to know whether my understanding of the purpose and intent of section 8014 is consistent with the original purpose and intent, and whether the amendment before us today is consistent with the original intent of section 8014.

MR. INOUYE. My Chairman is correct in his understanding. . . .

As the U.S. Supreme Court has made clear, time and again, the political and legal relationship that this nation has had with the indigenous, aboriginal, native people of America is the basis upon which the Congress can constitutionally enact legislation that is designed to address the special conditions of Native Americans. In exchange for the cession of over 500 million acres of land by the native people of America, the United States has entered into a trust relationship with Native Americans. Treaties, the highest law of our land, were originally the primary instrument for the expression of this relationship. Today, Federal laws like section 8014, are the means by which the United States carries out its trust responsibilities and the Federal policy of self-determination and economic self-sufficiency.

I thank my Chairman for proposing this clarifying amendment which I believe is fully consistent with the original purpose and intent of section 8014.

Cong. Rec. S5019 (June 13, 2000).[7] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969)

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[7] The amendment itself substituted tribal and organizational references for, and excised, "Native American ownership" in § 8014(3). *See* Cong. Rec. S4961 (June 12, 2000).

(footnote omitted) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). *See also Board of County Comm'rs v. Seber*, 318 U.S. 705, 710-11 & n.10 (1943) (relying in part on the "subsequent congressional history" in applying Indian legislation).[8]

### 4. There Is No Dispute Between Or Among Circuits For This Court To Resolve.

There is no varying decision, from any court, creating a dispute for this Court to resolve. *See* footnote 6 above. Petitioners rely, instead, on some hypothesizing, nonessential language of the Ninth Circuit in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir.), *cert. denied*, 523 U.S. 1117 (1997), but there is nothing material to that decision that conflicts with the Court of Appeals' decision in this case. *See Am. Fed'n of Gov't*

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[8] Petitioners decry an alleged overall lack of legislative support for § 8014, but both the Government and the private Respondents supplied massive amounts of legislative material in support of the program reflected in § 8014. The Court of Appeals referred to some, but by no means all, of this material. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 522, Pet. App. at 13a:

> It was therefore entirely proper for the district court to examine legislative material, generated in other contexts, showing the need for economic development of federally recognized tribes in Alaska. *Am. Fed'n of Gov't Employees*, 195 F.Supp.2d at 23. The United States has marshalled still more authorities to the same effect but we seen no need to go into them. . . . Plaintiffs do not really dispute the material. They say that it cannot be considered, a claim we have just rejected. We therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional. . . .

*See also Am. Fed'n of Gov't Employees*, 195 F.Supp.2d at 18-19 & 23.

*Employees*, 330 F.3d at 521, Pet. App. at 11. First, while the Ninth Circuit expressed its "constitutional doubts" about the agency interpretation, the court saw "no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available." *Id.* at 666. In that respect, the Ninth Circuit in *Williams* and the District of Columbia Circuit in the instant case are in harmony, not in disagreement. Second, at issue in *Williams* was an agency interpretation of the Reindeer Industry Act of 1937 that created an absolute prohibition on non-Native entry into the Alaska reindeer industry, where the Act said nothing about non-Native participation, let alone barred non-Natives altogether. In addition, the Act was not susceptible to tribal application and had not been applied in a manner that furthered tribal self-determination. *Id.* at 659. In this case, by contrast, the statute was applied so as not to create anything absolute, let alone an absolute prohibition, and was applied constitutionally and in conformity with its terms and intent. Third, § 8014(3) as enacted and applied directly furthers Indian tribal self-determination, which has as its "'overriding goal' . . . encouraging tribal self-sufficiency and economic development," *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (citation omitted), the goal that § 8014(3) promotes. *See Am. Fed'n of Gov't Employees*, 330 F.3d at 522, Pet. App. at 12a. The same was not said about the agency interpretation of the Reindeer Industry Act at issue in *Williams*. Thus nothing essential factually or legally in *Williams*, when set against the decision below, results in a conflict between circuits requiring resolution by this Court in this case. *See* Supreme Court Rule 10(a).

### 5. The Petition Overlooks The Special Constitutional Status Of Native Americans And The Government's Special Trust Responsibilities To Native Americans.

The petition, proceeding in a contextual vacuum, omits two principles applicable to Native Americans that do not apply to other minorities and that support the Court of Appeals' decision. First, Native Americans occupy a discrete, special constitutional status in the Indian Commerce Clause of the Constitution. *See Mancari*, 417 U.S. at 551-52; *Am. Fed'n of Gov't Employees*, 330 F.3d at 521-22, Pet. App. at 11a-12a; *United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (*en banc*) (Scalia, J.).

Second, the Government has a special trust responsibility to Native Americans. *See Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001): "The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship. . . . The federal government-Indian trust relationship dates back over a century." *See also Mancari*, 417 U.S. at 551 (referencing as one of the decisional standards the United States' "assumption of a 'guardian-ward status'" toward Indian tribes); *id.* at 552, *quoting Board of County Comm'rs v. Seber*, 318 U.S. at 715:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Petitioners cite (and in the lower courts cited) no case overriding the express constitutional position of Native Americans or disclaiming the Government's special responsibility to Native Americans. And, as noted above, petitioners cite no case declaring legislation premised on these two grounds and directed toward Indian advancement to be unconstitutionally race based. Rather, as ages of undiminished cases have held, the special status of Native Americans rebuts the notion that Indian legislation is race based. *See United States v. Antelope*, 430 U.S. 641, 646 (1977):

> Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation . . . But the principles of *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" . . . .

## CONCLUSION

For the foregoing reasons and the reasons set forth in the decision of the Court of Appeals, the petition should be denied.

Respectfully submitted,

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Section 8014(3) of the Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1234 (1999), permitted the Air Force to contract out work previously performed by more than ten federal civilian employees only after completing a "most efficient and cost-effective organization" analysis and certifying that analysis to Congress. That provision, however, allowed the Air Force to forgo such analysis where the Air Force converted an activity or function to performance by, *inter alia*, a qualified firm owned by federally recognized Indian tribes.

The question presented is whether Section 8014(3) violated petitioners' rights under the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 330 F.3d 513. The opinion of the district court (Pet. App. 15a-49a) is reported at 195 F. Supp. 2d 4.

### JURISDICTION

The judgment of the court of appeals was entered on June 6, 2003. The petition for a writ of certiorari was filed on September 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case arises from the United States Air Force's award of a civil engineering contract to an entity owned by federally recognized Indian tribal entities.

1. Section 8014 of the Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1234 (1999), prohibited the Department of Defense from using appropriated funds to pay private contractors for work previously performed by more than ten civilian government employees unless the Department first performed a "most efficient and cost-effective organization" (MEO) analysis and certified that analysis to Congress. Pet. App. 2a. Section 8014(3), however, contained an exception. Under that exception, the Department could forgo MEO analysis when converting certain commercial or industrial functions to performance by, *inter alia*, a qualified firm under "Native American ownership." *Ibid.*[1] In later appropriations acts, Section 8014(3) has been modified to specify that the firm must be owned by a federally recognized "Indian tribe." See, *e.g.*, Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8014, 114 Stat. 677 (2000); see also Pet. App. 3a.

In December of 1998, the Air Force announced that it would initiate a study of the 377th Civil Engineer Group (CEG) at Kirtland Air Force Base in Albequerque, New Mexico, to determine whether it would be efficient and cost-effective to hire a private company to perform the civil engineering functions then being

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[1] Section 8014 also allowed the Department of Defense to forgo MEO analysis when an activity is converted to performance by a qualified nonprofit agency for the blind, or by a qualified nonprofit agency for "other severely handicapped individuals." 113 Stat. 1234.

performed by United States Air Force employees. Before the competitive bidding process was fully under way, however, the Air Force declared its intention, pursuant to Section 8014(3), to utilize the "direct conversion" study process permitted by Section 8014(3) for firms owned by Native Americans. The Air Force solicited capability statements from three such firms. Officials at Kirtland Air Force Base determined that cost savings could be achieved by converting civil engineering functions at the Base from in-house performance to performance by Chugach Management Services, JVC (Chugach), a joint venture owned by the Chugach Alaska Corporation and Afognak Village Corporation, which are Alaska Native Corporations formed pursuant to the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971), codified as amended at 43 U.S.C. 1601 *et seq.*[2] The Air Force awarded the contract to Chugach in 2000 and consequently eliminated a number of positions at the Kirtland Air Force Base. Pet. App. 2a, 17a.

2. Petitioners Rose Reed and Inez Marquez were civilian Air Force employees assigned to the 377th CEG at Kirtland Air Force Base. After the Air Force awarded the contract to Chugach, Marquez retired from Air Force employment and was hired by Chugach

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[2] Chugach is a joint venture between Chugach Management Services, Inc., and Alutiiq Management Services, LLC. Chugach Management Services, Inc., is a wholly owned subsidiary of the Chugach Alaska Corporation. Alutiiq Management Services, LLC, is a wholly owned subsidiary of Afognak Village Corporation. Congress specifically included Alaska Native Villages within the definition of "Indian tribe" in 25 U.S.C. 450b(e), which it has made applicable in this setting. See Pet. App. 2a, 16a; pp. 16-17 & note 6, *infra*. Petitioners have never disputed that Chugach qualifies as a firm owned by tribal entities for present purposes.

to work on the contract. Petitioner Reed relocated to a federal job elsewhere in the country. Together with petitioner American Federation of Government Employees, Local 2263—a labor organization whose members occupied positions affected by the award to Chugach—they filed this suit against the United States and James G. Roche, in his official capacity as Secretary of the Air Force. Pet. App. 17a.

The complaint asserted only a facial challenge to a portion of Section 8014(3) as it appeared in the Department of Defense's fiscal year 2000 appropriation act. The complaint alleged that Section 8014(3), by permitting the Air Force to forgo a "most efficient and cost-effective organization" analysis when converting an activity to performance by a qualified firm under "Native American" ownership, violated the equal protection component of the Due Process Clause of the Fifth Amendment. Pet. App. 3a, 16a-17a. According to the complaint, the classification "Native American" is racial and its use is therefore subject to strict scrutiny. *Id.* at 4a. Chugach intervened in the lawsuit and, on June 30, 2000, the district court denied petitioners' motion for a preliminary injunction. 104 F. Supp. 2d 58.[3]

On cross-motions for summary judgment, the district court entered judgment in favor of respondents. Pet. App. 15a-49a. The district court concluded that Section 8014(3) is subject to rational basis review because it does not discriminate on the basis of race or another suspect or quasi-suspect category. See *id.* at 38a.

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[3] Asserting a property interest in federal employment, petitioners also argued that Section 8014(3) violates substantive due process. The district court, Pet. App. 47a-49a, and the court of appeals, *id.* at 14a, both rejected that argument, and petitioners do not re-assert it here.

Instead, Section 8014(3) draws a political distinction. *Ibid.* The Indian tribes, the court explained, are separate quasi-sovereigns to which the United States owes a unique trust responsibility. *Id.* at 39a-40a. The court concluded that Section 8014(3) was a reasonable means by which Congress may fulfill its special obligations to the Indian tribes, including Alaska Native Corporations. *Id.* at 40a-47a; see p. 3, note 2, *supra.*

3. The court of appeals affirmed. Pet. App. 1a-14a. Addressing the scope of the issues before it, the court first held that petitioners' request for an injunction against the contract award under the Department of Defense Appropriations Act for fiscal year 2000 was moot, that fiscal year having long since passed. *Id.* at 5a. In addition, the court held that claimants lacked standing to challenge any contracting decisions under Section 8014(3) other than the one at Kirtland Air Force Base, since petitioners had identified no past or imminent future risk of harm to themselves from such other contracting decisions. *Ibid.*

The court also declined to address petitioners' claim that Section 8014(3) is unconstitutional because, under it, the Air Force allegedly could have accorded preferences "not only for Indian tribes but also for firms owned by Native Americans who were not tribal members." Pet. App. 5a. "[O]ne to whom application of a statute is constitutional," the court observed, "will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Id.* at 5a-6a (quoting *United States* v. *Raines*, 362 U.S. 17, 21 (1960)). Here, the contract was awarded to a firm owned by federally recognized Indian tribes, not by individual non-tribal Native Americans. In addition, so far as the litigants or

the court was aware, Section 8014(3) had been invoked only once before, also to award a contract to an entity owned by a federally recognized Indian tribe. Finally, the version of Section 8014(3) enacted in more recent Appropriations Acts largely limited itself to entities owned by federally recognized Indian tribes. *Id.* at 3a; see p. 18 & note 7, *infra*. Thus, although petitioners' constitutional challenge was premised on the assertion that Section 8014(3) provided a racial preference for firms owned by individual non-tribal Indians as determined by race, petitioners failed to show that such a preference had ever been or would ever be granted. Pet. App. 5a. The court accordingly held that the "only question properly before" it was "whether the government violated the equal protection component of the Due Process Clause when it invoked § 8014(3) to grant a contract to a firm wholly owned by *Indian tribes*." *Id.* at 6a-7a (emphasis added).

So limiting the scope of the question under review, the court also explained, is consistent with the need to avoid "advisory" opinions about "hypothetical applications of § 8014(3)" that were not likely to arise. Pet. App. 7a-8a. The court thus saw no reason to address the government's argument that Section 8014(3)'s reference to firms with "Native American ownership" should be construed as including only firms owned by "members" of federally recognized Indian tribes or by the Tribes themselves. *Id.* at 8a; see *id.* at 4a. Because no preferences had been granted to firms owned by individual Indians (tribal or non-tribal), that issue was not before the court. Instead, "the only issue" was "the validity of a preference for Indian tribes" themselves. *Id.* at 8a.

Turning to that issue, the court of appeals held that preferences for federally recognized Indian tribes are

"normally" subject only to rational basis review. Pet. App. 6a, 8a-9a.[4] The court explained that Congress has exclusive and plenary authority "to determine which 'distinctly Indian communities' should be recognized as Indian tribes," *id.* at 8a-9a (quoting *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913)), and to "legislate on behalf of federally recognized Indian tribes" under treaties and authority "drawn both explicitly and implicitly from the Constitution itself," *id.* at 9a (quoting *Morton* v. *Mancari*, 417 U.S. 535 (1974)). The court of appeals observed that, in light of that authority and Congress's exclusive power under the Indian Commerce Clause to "regulate Commerce * * * with the Indian Tribes," U.S. Const. Art. I, § 8, Cl. 3, this Court has repeatedly sustained legislation that treats Indian tribes differently from other persons and entities. Pet. App. 8a-9a. This "Court's decisions," the court of appeals explained, "leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based on impermissible racial classifications." *Id.* at 9a (quoting *United States* v. *Antelope*, 430 U.S. 641, 645 (1977)); see *id.* at 9a-10a (canvassing this Court's decisions upholding preferences for Indian tribes).

The court of appeals rejected petitioners' argument that the classification at issue here is "racial" rather than "political" and therefore subject to strict scrutiny under *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995). The court observed that, notwithstanding

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[4] The court used the qualifier "normally" to except those cases in which Congress, in enacting what facially appears to be a preference for Indian tribes, has an illegitimate discriminatory purpose. Pet. App. 6a (citing *Washington* v. *Davis*, 426 U.S. 229 (1976)).

the strict scrutiny applicable to racial classifications, this Court has held that "the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." Pet. App. 10a (quoting *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979) (internal quotation marks omitted)).

The court of appeals agreed that there might be more "difficult" cases given *dictum* in this Court's decision in *Mancari*, as well as the observation in *Rice* v. *Cayetano*, 528 U.S. 495, 519-520 (2000), that the preference in *Mancari* was limited to employment in the Indian service. But the court of appeals concluded that this case is not a "difficult" one:

> The critical consideration is Congress' power to regulate commerce "with the Indian Tribes." While Congress may use this power to regulate tribal members, * * * regulation of commerce with [the] tribes [themselves] is at the heart of the Clause, particularly when the tribal commerce is with the federal government, as it is here. * * * When Congress exercises this constitutional power it necessarily must engage in classifications that deal with Indian tribes. Justice Scalia, when he was on our court, put the matter this way: "in a sense the Constitution itself establishes the rationality of the . . . classification, by providing a separate federal power that reaches only the present group." *United States* v. *Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc).

Pet. App. 11a. The court of appeals accordingly concluded that, when Congress enacts legislation that di-

rectly regulates federal commerce with federally recognized Indian tribes, distinctions between the Tribes and non-tribal entities are subject only to rational basis review. *Id.* at 11a-12a.

Section 8014(3), the court of appeals concluded, survives rational basis review because it promotes "tribal economic development." Pet. App. 12a. The court rejected petitioners' contention that Congress was required to specify its purpose or reasons for the preference in legislative history. *Ibid.* So long as there are plausible reasons for Congress's action, the court held, the legislation must be upheld. Here, "the economic development of federally recognized Indian tribes * * * is rationally related to a legitimate legislative purpose and thus constitutional." *Id.* at 13a.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Nor does the decision raise an issue of importance warranting this Court's review. To the contrary, while petitioners purport to challenge as unconstitutional a putative application of Section 8014(3) of the Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1234 (1999)—the granting of preferences for entities owned by individual Native Americans as determined by race—the court of appeals declined to address that application because it was wholly hypothetical. Section 8014(3) had never in the past been applied to grant preferences in that fashion; it has been applied only to benefit entities owned by *Indian tribes*, *i.e.*, by quasi-sovereign domestic nations based on their unique constitutional, historical, and political status—an application petitioners do not appear to question. Congress, moreover,

has amended Section 8014(3) to clarify that the preferences at issue may not be granted in the fashion petitioners challenge as unconstitutional.

1. Petitioners do not dispute that Congress may distinguish between the federal government's commerce with Indian tribes on the one hand and its economic interactions with non-tribal entities or persons on the other. See Pet. 7 ("some political preferences for Native American tribes may be permissible"). Indeed, petitioners concede that this Court has repeatedly upheld separate and often preferential treatment of Indian tribes. See *ibid.* (citing *Morton* v. *Mancari*, 417 U.S. 535, 553-554 (1974)). Unlike other individuals or entities, Indian tribes—political units—have a "unique legal status" under the Constitution as domestic sovereign nations. *Mancari*, 417 U.S. at 551. Consequently, where Congress singles out interactions with the Tribes for differential regulation, the distinction is political rather than racial and must be upheld so long as it is rationally designed to further Indian self-goverance. See *id.* at 552-555; Pet. 7-8. This is true even when Congress provides benefits to members of federally recognized Indian tribes, rather than the Tribes themselves. As the Court explained in *Mancari*, preferential treatment for federally recognized Indian tribes "does not constitute 'racial discrimination'" and "is not even a 'racial' preference" because "[t]he preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes" and "operates to exclude many individuals who are racially to be classified as 'Indians.'" 417 U.S. at 553-554 & n.24. Preferences that run in favor of the Tribes themselves are *a fortiori* "political rather than racial in nature." *Id.* at 553, 554 n.24.

Congress's unique authority to legislate on behalf of the Tribes as politically defined groups "with their own political institutions" is "expressly provided for in the Constitution." *United States* v. *Antelope*, 430 U.S. 641, 645-646 (1977); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978); *United States* v. *Cohen*, 733 F.2d 128 (D.C. Cir. 1984) (en banc) (Scalia, J.). Federal laws that single out the Tribes themselves thus are part and parcel of the governance of "once-sovereign political communities" and are "not to be viewed as legislation of a 'racial group' consisting of 'Indians.'" *Antelope*, 430 U.S. at 646 (quoting *Mancari*, 417 U.S. at 533 n.24). Indeed, the "decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *Id.* at 645-646; see *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976) (tribal classifications "neither 'invidious' nor 'racial' in character"). Consequently, as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," reasonably promoting tribal self-governance through (for example) economic development, "such legislative judgments will not be disturbed." *Mancari*, 417 U.S. at 555; see *Yakima Indian Nation*, 439 U.S. at 500-501 (holding that Congress may legislatively single out Indian tribes subject to rational basis review).

Under those principles, the court of appeals' decision to uphold Section 8014(3) on "the facts of this case," Pet. App. 6a, is unquestionably correct. In this case—and in the only other known application of Section 8014(3)—Section 8014(3) was employed to grant a contract not to an entity owned by individual Native Americans (or

even members of an Indian Tribe), but rather "to a firm wholly owned by *Indian tribes*" themselves. *Id.* at 6a-7a (emphasis added). Limiting its decision to that circumstance, see *id.* at 8a, the court of appeals concluded that Congress's decision to encourage federal commerce with Tribes as distinct domestic sovereigns is subject only to rational basis review under this Court's decision in *Mancari* and its progeny. This Court's cases make clear that such a distinction—which treats *Tribes* rather than individual Indians differently from other entities—is not based on race. It is instead based on the Tribes' distinct legal and political status as domestic sovereign nations subject to the protection of—and having a special constitutional and historical relationship with—the federal government. So "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward" the Tribes and their unique political status, "such legislative judgments will not be disturbed." 417 U.S. at 555.

Indeed, because this case concerns the federal government's economic interactions with the Tribes themselves, *i.e.*, trade between the United States and the Tribes as domestic quasi-sovereigns—it represents a straightforward case. The authority to treat commerce with the Tribes differently is recognized in the Constitution itself. As the court of appeals held and petitioners nowhere dispute, the Constitution grants Congress specific and plenary authority to regulate commerce with the Indian tribes through the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3. See Pet. App. 11a. Treating Tribes differently is thus rational. That is particularly true where, as here, Congress is regulating the federal government's *own* commerce with the Tribes. *Ibid.* A congressional decision to direct federal purchases toward a favored

foreign nation (even one with citizens overwhelmingly of a single race) could not be challenged as racial (or national origin) discrimination. The same is true of Congress's decision to direct federal contracting toward domestic sovereign nations, such as the Indian tribes, to the States, or to other political entities or sovereigns.

2. Petitioners nonetheless argue that Section 8014(3) is a "racial" preference because, as Section 8014(3) existed in fiscal year 2000, it allowed the Defense Department to contract out governmental activities or functions (without performing a most efficient and cost effective organization analysis) when the contracting firm was under "Native American" ownership. Petitioners, however, do not dispute that Section 8014(3) has never been used to accord a preference to an entity owned by individual Native Americans—tribal or non-tribal—rather than to entities owned by federally recognized quasi-sovereign Indian tribes. Nor do petitioners dispute that, insofar as it is relevant here, Section 8014(3) in its current form can benefit only entities owned by the Tribes themselves. See p. 18 & note 7, *infra*. Nonetheless, petitioners characterize the decision below as upholding a purportedly "racial" preference because Section 8014(3) *could have* been (but was not) used to benefit firms owned by individual, non-tribal Indians as determined by race.

a. The argument is without merit. Contrary to petitioners' characterization, the court of appeals did not uphold "racial" preferences for individual, non-tribal Indians under Section 8014(3). Instead, it declined to consider that hypothetical application of Section 8014(3). A plaintiff "to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it *might* also be taken as applying to other persons *or other situations*

in which its application might be unconstitutional." Pet. App. 5a-6a (emphasis added) (quoting *United States* v. *Raines*, 362 U.S. 17, 21 (1960)); cf. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."). Here, Section 8014(3) has been invoked to award contracts only to entities owned by federally recognized Indian tribes. The only application of Section 8014(3) petitioners had standing to challenge involved a contract with such an entity.[5] And the statute, as it now exists, cannot be construed to apply to entities owned by individual Native Americans as opposed to those owned by federally recognized Tribes themselves. See p. 17 & note 7, *infra*. Petitioners have offered nothing "to suggest that there were any other 8014(3) contracts awarded in FY 2000, or that any contract went to the type of Native American firm they imagine, or that they were thereby adversely affected." Pet. App. 6a. As a result, the court of appeals correctly held that the "only question properly before" it was "whether the government violated the equal protection component of the Due Process Clause when it invoked § 8014(3) to grant a contract to a firm *wholly owned by Indian tribes*." *Id.* at 6a-7a (emphasis added); see *id.* at

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[5] See Pet. App. 5a (petitioners "lack standing to pursue" the claim for relief "insofar as it relates to contracts other than the one at Kirtland," where the contract was awarded to an entity owned by a Tribe); *id.* at 6a ("The only relief they are possibly entitled to receive * * * is specific to Kirtland," where the contract was not awarded to an entity owned by "non-tribal Native American[s].").

8a ("only issue properly before" the court "is the validity of a preference for *Indian tribes*") (emphasis added).

Petitioners thus err in asserting that the court of appeals construed Section 8014(3) as "creating a racial preference," Pet. 6, or held that preferences for individual, non-tribal Indians are permissible, Pet. 7. The court of appeals did not so construe the statute. More important, the court of appeals expressly declined to address whether such preferences would be constitutional. This Court does not ordinarily grant review to "decide in the first instance issues not decided," let alone expressly avoided, "below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001). Yet it is an issue not addressed by the court of appeals—indeed, an abstract constitutional question concerning a hypothetical application of a now-superseded version of Section 8014(3)—on which petitioners seek review here.

b. The petition, moreover, fails to challenge the court of appeals' reasons for refusing to address the issue petitioners press before this Court, *i.e.*, the validity of preferences for entities owned by non-tribal Native Americans as identified by race. As noted above (p. 14 & note 5, *supra*), the court of appeals held that petitioners lack standing to challenge such "race-based" applications because petitioners failed to show that such preferences had ever been granted, were likely to be granted, or that petitioners had been or might conceivably be harmed thereby. The court of appeals also explained that prudential rules counsel against the issuance of potentially advisory opinions on such hypothetical circumstances. See Pet. App. 7a-8a

(declining to address "hypothetical applications [that] cannot be considered real" and "that may never arise").

Petitioners simply ignore those barriers. This Court does not ordinarily grant review in such circumstances. To the contrary, where the court of appeals identifies jurisdictional or other procedural barriers to an issue's resolution, and the petition raises that issue without addressing the barriers, the Court generally deems review inappropriate. See *Adarand*, 534 U.S. at 109-110 (dismissing petition as improvidently granted where "the petition for certiorari nowhere disputed the Court of Appeals' explicit holding that petitioner lacked standing to challenge the very provisions" that petitioner was asking the Court to review).

Thus, while petitioner is correct that governmental classifications based on race are subject to strict scrutiny under *Adarand*, that rule has no application to the issue addressed by the court of appeals—the validity of federal legislation granting preferential treatment to federally recognized *Indian tribes* as quasi-sovereign entities. Nor has petitioner offered any reason for disregarding the court of appeals' sensible decision to confine its opinion to the concrete controversy before it and to avoid adjudication of hypothetical applications of Section 8014(3) that have not arisen and do not appear likely to arise.

c. The petition does not present a question of ongoing significance because, after this suit was filed, Congress enacted new and superseding versions of Section 8014(3) that cannot be applied to benefit entities merely because they are owned by persons who are racially identified as Native Americans. In 2000, Congress amended Section 8014(3) to clarify its meaning by substituting the phrase "ownership *by an Indian tribe*, as defined in [25 U.S.C. 450b(e)], or a

Native Hawaiian organization, as defined in [15 U.S.C. 647(a)(15)]" for the less illuminating short-hand of "Native American ownership." Amendment No. 3319, 146 Cong. Rec. S4961 (daily ed. June 12, 2000), Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8014, 114 Stat. 677 (2000) (emphasis added).[6]

In proposing that revision, moreover, the Senate sponsors of the original language in Section 8014(3) stated an intent to "further clarify that the exception for Native American-owned entities in section 8014 is based on a political classification, not a racial classification." 146 Cong. Rec. S5019 (daily ed. June 13, 2000) (colloquy between Sen. Stevens and Sen. Inouye). The sponsor specifically stated that:

> The Native American exception contained in section 8014 is intended to advance the Federal Government's interest in promoting self-sufficiency and the economic development of Native American communities. It does so not on the basis of race, but rather, based upon the unique political and legal status that the aboriginal, indigenous, native people of * * * America have had under our Constitution since the founding of this nation.

*Ibid.* (Sen. Stevens). Moreover, Senator Inouye, who was involved in drafting the original Section 8014(3),

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[6] 25 U.S.C. 450b(e) (brackets in original) provides:

> "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

agreed that the amending language reflects that "the exception for Native American-owned entities" in the original version of Section 8014(3) was "based on a political classification, not a racial classification." *Ibid.*

Because implementation of Section 8014(3) in the future has (with one exception not relevant to this litigation) been limited to benefitting entities owned by federally recognized Tribes and tribal entities—furthering the cause of self-governance by encouraging tribal self-sufficiency through economic development—respondents are incorrect in asserting that the court of appeals' decision "shields a patently racial preference from strict scrutiny." Pet. 7.[7] They are incorrect first because the court of appeals did not address the validity of putatively "racial" preferences for firms owned by Indians as determined by race. See pp. 14-15, *supra*. They err second because the Fiscal Year 2000 version of Section 8014(3) was never interpreted or applied to provide for such preferences. See pp. 5-6, *supra*. And they err third because the current version of the statute specifically precludes such preferences. Petitioners, furthermore, raise no challenge to the current version of Section 8014(3) in this lawsuit. Instead, they confine their challenge to the now-superseded version of Section 8014(3) as it existed in the Department of Defense Appropriations Act for fiscal year 2000.

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[7] The amended language includes, in addition to federally recognized Indian tribes, Native Hawaiian organizations (which do not have federal recognition like that of the Indian tribes, see p. 19 note 8, *infra*). Nothing in this litigation involves the legitimacy of federal classifications concerning Native Hawaiian organizations. Petitioners, moreover, have confined their challenge to Section 8104(3) in the fiscal year 2000 Appropriations Act, which did not mention Native Hawaiian organizations.

3. Notwithstanding the distinction between legislation that favors Indian tribes (*qua* political sovereigns) and legislation favoring individual Native Americans (as determined by race), petitioners appear to suggest that *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), undermines the validity of the tribal classifications upheld in *Mancari* and its progeny. But *Adarand* says nothing about Congress's authority to legislate with respect to Tribes—distinct domestic sovereign nations with a unique history and special constitutional status—or Congress's power to enact separate regulations concerning its own "Commerce * * * with the Indian Tribes," U.S. Const. Art. I, § 8, Cl. 3. It says nothing to undermine the longstanding distinction between "racial" classifications and political ones. And it has no bearing on the application of Section 8014(3) addressed by the court of appeals. That application does not favor individual Native Americans as determined by race (or even Tribal affiliation) but rather promotes federal commerce with entities owned by the Tribes themselves based on the Tribes' special political and constitutional quasi-sovereign status as domestic nations.[8]

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[8] For similar reasons, *Rice* v. *Cayetano*, 528 U.S. 495 (2000), cited Pet. 12, is inapposite. That case concerned whether the Fifteenth Amendment permitted the State of Hawaii to restrict voting rights for certain state officials to Native Hawaiians and Hawaiians, categories that were defined by race or ancestry as a proxy for race. *Id.* at 499, 514-517. Holding that the Fifteenth Amendment precluded such classifications in voting, this Court declined to read *Mancari* as permitting States, "by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs." *Id.* at 522. This case obviously has nothing to do with voting or the Fifteenth Amendment; it has to do with the federal government's own commerce with the Indian tribes. Moreover, while the distinction at issue in *Rice* was racial,

Petitioners likewise err in arguing that the "courts of appeals have taken widely contrary approaches in addressing Indian preferences in light of *Adarand*." Pet. 12. Petitioners identify only one case—*Williams* v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998)—that, according to petitioners, has departed from the longstanding approach illustrated by *Mancari*. But petitioners acknowledge that *Williams*' suggestion that *Mancari* might "shield[] only those statutes that affect uniquely Indian interests," *id.* at 665, was *dictum*, since *Williams* was decided on statutory grounds, *id.* at 666. *Williams*, moreover, concerned the preferential treatment of individual Native Americans through the exclusion of non-natives from the reindeer business. The decision thus had no reason to address, and did not resolve, the issue here—the federal government's own commerce with the Indian tribes as quasi-sovereign domestic nations. Finally, petitioners do not even argue that Section 8014(3) fails to advance "uniquely Indian interests" within the meaning of *Williams*. In particular, petitioners do not dispute that Section 8014(3) is a rational means of promoting tribal self-governance by encouraging tribal self-sufficiency through economic development. See *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987) ("Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their

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the distinction here is between a particular set of political institutions—the Indian tribes—and all other entities. Finally, *Rice* dealt with preferential treatment of Native Hawaiians, rather than federally recognized Indian tribes as they have been recognized in other settings. *Id.* at 518-519.

members."). The *Williams* decision thus has no bearing on the proper resolution of this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-359

In the
# Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,

*Petitioners,*

v.

UNITED STATES, et al.

*Respondents.*

**On Petition for Writ of Certiorari to the United States Supreme Court for the District of Columbia Court of Appeals**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is the preference for Native Americans in section 8014 of the Department of Defense Appropriations Act, which is neither restricted to Indian tribes, nor related to uniquely Indian interests, subject to rational basis review under *Morton v. Mancari*, 417 U.S. 535 (1974), or strict scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)?

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## INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of Petitioners. Consent to file this brief was obtained from all parties and has been lodged with the Clerk of this Court.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California, for the purpose of engaging in matters affecting the public interest. PLF has participated in numerous cases involving discrimination on the basis of race including *Rice v. Cayetano*, 528 U.S. 495 (2000), *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995), *University of California v. Bakke*, 438 U.S. 265 (1978), *U.S. Air Tour Association v. F.A.A.*, 298 F.3d 997 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1783 (2003); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987), and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). PLF considers this case to be of special significance in that it impacts every state and federal preference for Native Americans.

## STATEMENT OF THE CASE

In January, 1999, Congress passed the Defense Appropriations Act for Fiscal Year 2000. Buried among its various provisions for pay, retirement, training, and maintenance of our armed forces, section 8014 of the act grants a preference for civil contracting firms owned by Native Americans. Defense Appropriations Act for FY 2000, Pub. L. No. 106-79, § 8014, 113 Stat 1212 (1999), provided that none of the appropriation funds could be used to "out source" jobs

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

unless the Department conducted a long and complicated cost-benefit analysis. But the Department could forego the analysis if it granted the contracts to firms with at least 51% Native American ownership.

Pursuant to this section, Kirtland Air Force Base in Albuquerque, New Mexico, notified Congress that it would be engaging in a cost-benefit analysis to determine if it was advisable to out source various base maintenance operations. Shortly after the required notifications were published, Chugach Management Services (CMS), Joint Venture, notified the base of its interest in the contract. CMS is a joint venture of Chugach Management Services, Inc., and Alutiiq Management Services, both of which are owned by federally recognized tribes. Because the majority of CMS is owned by Native Americans, the firm qualified for the section 8014 preference. Invoking that preference, the Air Force skipped the cost-benefit analysis and awarded the 523 million dollar contract to CMS. The contract is for one year, with nine one-year options to renew. As a result of the conversion, over 240 civil engineers lost their jobs.

The former employees and their unions filed an action against the Department of Defense, the Secretary of the Air Force, and CMS in the United States District Court for the District of Columbia. This facial challenge to section 8014 claimed that it violated the equal protection component of the Fifth Amendment. On cross-motions for summary judgment, the trial court applied the rational basis review standard of *Morton v. Mancari*, 417 U.S. 535 (1974), and found no equal protection violation. The district court determined that classifications involving Native Americans are always political rather than racial and applied the lower standard of review set out in *Mancari*. *American Federation of Government Employees v. United States*, 195 F. Supp. 2d 4, 20 (D.C. Cir. 2002).

Petitioners' facial challenge fared no better in the United States Court of Appeals for the District of Columbia. Finding that the corporation receiving the contract was owned by a federally recognized tribe, the court refused to analyze the constitutionality of the language permitting the preference for corporations with 51% Native American ownership. *American Federation of Government Employees v. United States*, 330 F.3d 513, 518 (D.C. Cir. 2003). The court then found "tribal economic development" to be a sufficient justification for the preference and upheld the decision of the lower court.

Petitioners now seek review of the decision of the District of Columbia Circuit Court's ruling that a preference for Native Americans, neither dependent on tribal status nor related to uniquely Indian interests, need only satisfy the rational basis standard of review under the Equal Protection Clause.

## SUMMARY OF ARGUMENT

At present, there is considerable confusion as to the correct standard of review for constitutional challenges to government preferences for Native Americans under the Equal Protection Clause. Though *Mancari* analyzed certain preferences aimed at tribes and relating to "uniquely Indian interests" under rational basis, more recent case law suggests that preferences based on racial classifications should be analyzed under strict scrutiny.

The confusion over the standard of review has led to a direct conflict among the federal courts of appeals. The District of Columbia Circuit Court has determined that Congress need not limit a preference to tribes or tribal members to qualify for *Mancari*'s lower rational basis standard. Conversely, the Ninth Circuit Court determined that strict scrutiny is the correct standard unless the preference is related to uniquely Indian interests and limited to tribes or tribal members. *See Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997); *Dawavandewa v. Salt River Project Agric. Improvement & Power District*, 154 F.3d

1117 (9th Cir. 1998). Moreover, the circuit courts conflict over whether economic assistance to tribes is a sufficient constitutional justification for a preference that is not limited to tribal members. Thus, it is altogether unclear how a federal court should analyze a preference for Native Americans. Identical sets of facts will result in contradictory outcomes depending on the circuit in which the case is filed. This Court should therefore grant the Petition for Writ of Certiorari and announce the proper standard of review for cases involving government preferences for Native Americans.

## ARGUMENT

## I

## THE PROPER STANDARD OF REVIEW FOR NATIVE AMERICAN PREFERENCES IS AN IMPORTANT FEDERAL QUESTION

This case presents the Court with an important issue in need of immediate judicial resolution. The number of government preferences for individuals and groups claiming "Native American" or "Indian" status is increasing. *See* Clay R. Smith, *"Indian" Status: Let a Thousand Flowers Bloom*, 46 Mar. Advocate 18 (2003) (noting that at least 160 federal programs offer race-based preferences and, particularly in the area of public contracting, Congress has expressed a desire to extend preferences to all "Native Americans" including American Indians, Eskimos, Aleuts, or Native Hawiians). Additionally, Congress is now considering legislation that would grant Native Hawaiians federal recognition, giving them the same status as federally recognized Indian tribes. *See* Native Hawaiian Recognition Act of 2003, S. 344, 108th Cong. (1st Sess. 2003). Thus, as government preferences continue to increase for Indian tribes and individual Indians, and with the number of federally recognized tribes on the rise, it is imperative that this Court determine whether and to what extent *Mancari* exempts these preferences from the

heightened scrutiny that otherwise applies to racial classifications.

Furthermore, as Indian tribes enter the mainstream of economic and political life, competing with Americans of every background and ethnicity for employment, contracting opportunities, and other government benefits, it is ever more crucial that the constitutional standard for challenges to tribal preferences be certain. In fiscal year 2001, tribal gaming revenue nationwide was $12.7 billion dollars. *National Indian Gaming Association*, Library and Resource Center, www.indiangaming.org/library/ index.html. With this newfound wealth, Indian tribes are now able to influence policy through political campaign contributions and are able to lobby directly for more government preferences. *See* Don Hilgendorf, *Tribes Have Become Players in Sacramento*, L.A. Times (Sept. 27, 2003) (noting that tribes spent 6.6 million dollars in the recent California recall election, making them the largest donors in the race). In many states, tribes and their associated interest groups have spent considerable resources promoting referenda on tribal gaming. *See* Center for Responsive Politics, Background: Indian Gaming, *available at* http://www.opensecrets.org/industries/background.asp?Ind=G6550. Tribes have also directed lobbying efforts at attaining preferential treatment in other areas such as education, health care, and public contracting. *See* Hilgendorf, *supra*. As one commèntator noted, "Indian gaming participants are learning the savvy techniques involved in the game of politics and power." Tobi Edward Longwitz, *Indian Gaming: Making a New Bet on the Legislative and Executive Branches After IGRA's Judicial Bust*, 7 Gaming L. Rev. 197, 201 (2003).

Tribes now enjoy government preferences that are aimed solely at granting economic benefits, rather than promoting any unique Indian interest, as was the case in *Mancari*. Now that Indian tribes wield significant political power, it is likely that legislation granting preferences to Indian tribes will increase.

*See* Smith, *supra* (noting Congress' willingness to grant more government preferences for "Indians and "Native Americans"). Therefore it is crucial that the federal courts have a uniform standard of review for evaluating the constitutionality of such preferences.

The decisions of this Court in both *Adarand* and *Rice* have created great uncertainty as to the constitutional limitations on government preferences for both tribes and unaffiliated Native Americans. It is unclear whether preferences for Native Americans that do not require tribal membership are subject only to rational basis review under *Mancari* or heightened scrutiny under *Adarand*. It is also unclear whether preferences to Indian tribes that are aimed solely at benefitting tribes economically must only withstand rational basis review. Thus, parties litigating equal protection challenges to these preferences are likely to face different standards of review and suffer the uncertainty of inconsistent verdicts depending on the forum.

Although the government contract in this case was awarded to a tribe, the section 8014 preference did not require tribal membership. Instead, the provision only required that a firm be owned, in part, by Native Americans. Therefore, this case provides the perfect vehicle for addressing the limitations on *Mancari* both as it relates to preferences for individuals who are not members of federally recognized tribes, and as it relates to government preferences that do not serve any uniquely Indian interest.

In *Mancari*, this Court upheld employment preferences at the Bureau of Indian Affairs (BIA) for members of federally recognized tribes. Noting that Congress has constitutional authority to regulate commerce with tribes, the Court held that the preference was granted "not to a discrete racial group," but to "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." 417

U.S. at 554. The Court was also careful to note that the case was limited to the authority of the BIA, an agency described as "sui generis." *Id.* In fact, the Court explicitly refused to address "the more difficult question" of blanket exemptions or preferences unrelated to Indian self-government. *Id.* Although the preference at issue in *Mancari* did require that applicants possess a certain quantum of Indian blood, the *Mancari* Court did not focus on this fact. Instead, the Court characterized the preference as political rather than racial because individuals were also required to be members of federally recognized tribes. *Id.* & n.24. Based on this distinction, the Court applied rational basis review and upheld the preference as "reasonably and directly related to a legitimate, nonracially based goal." *Id.*

The characterization of the *Mancari* preference as political rather than racial has undergone increasing criticism from academic scholars and members of this Court. *See* Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv. L. Rev. 1754, 1761-62 (1997) (noting that the Mancari Court refused to consider the fact that "race, as measured by blood quantum, was a but-for requirement of eligibility for the preference"); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 713 (2001). There is a substantial question as to whether preferences for Native Americans are subject only to rational basis review under *Mancari* even if the preferences lack a "political" component limiting the reach to members of federally recognized tribes. For instance, in one dissenting opinion, Justices Stevens and Ginsberg have suggested that the *Mancari* rational basis analysis should apply regardless of whether a tribal affiliation exists. *See Rice v. Cayetano*, 528 U.S. at 535 (Stevens, J., dissenting).

It is also unclear what portion of the *Mancari* analysis, if any, survives after this Court's ruling in *Adarand.* In *Adarand*, this Court made three points clear. First, "racial

classifications [are] constitutionally suspect.'" 515 U.S. at 223 (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)). Second, "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." *Adarand*, 515 U.S. at 224 (citing *City of Richmond v. Croson*, 488 U.S. 469, 494 (1989) (plurality opinion)). Third, "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo,* 424 U.S. 1, 93 (1976). The Court concluded that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are *narrowly tailored measures that further compelling government interests*." *Adarand*, 515 U.S. at 227 (emphasis added). The Court recently reaffirmed this standard of review for racial classifications in *Grutter v. Bollinger*, 123 S. Ct. 2325, 2337 (2003), and *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427 (2003).

Since this Court's decision in *Adarand*, there has been much debate over its effect on Native American, tribal, and nontribal government preferences. Some scholars contend that *Adarand* does apply to preferences for Native Americans. *See* Wayne R. Farnsworth, *Bureau of Indian Affairs Hiring Preferences After Adarand Constructors, Inc. v. Pena*, 1996 B.Y.U. L. Rev. 503, 522-25 (1996) (noting that government preferences without a tribal membership component would fail under *Adarand*); William Bradford, *"With a Very Great Blame in Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 Am. Ind. L. Rev. 1, 131 (2002-03) (noting that "*Adarand* and *Rice* are harbingers of judicial retreat to a stricter standard of scrutiny of remedial legislation benefitting Indians"); Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale. L.J. 537, 567 (1996) (arguing that

*Adarand* and *Croson* have "changed the constitutional landscape" for Native American preferences). While they acknowledge that some preferences may be sufficiently narrowly tailored to survive strict scrutiny, they conclude that preferences not dependent upon tribal status would fail under *Adarand*. *See* Farnsworth, *supra*, at 522-25. Another scholar contends that Congress' constitutional power to regulate commerce with Indian tribes permits all racial classifications benefitting Native Americans, regardless of tribal affiliation, and therefore *Adarand*'s strict scrutiny standard of review would not apply to such preferences. *See* Carole Goldberg, *American Indians and Preferential Treatment*, 49 UCLA L. Rev. 943, 970 (2002); Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. Rev. 169, 174-175 (1991).

This Court's most recent decision discussing *Mancari* implies that there are constitutional limitations on government's power to create racial preferences favoring Native Americans. In *Rice v. Cayetano*, this Court analyzed the constitutionality of a Hawaiian statute allowing only descendants of indigenous Hawaiians to vote for certain offices. While the case was ultimately decided on Fifteenth Amendment grounds, this Court addressed *Mancari*, confining it to matters of quasi-sovereign authority relating to self-governance. 528 U.S. at 520. Although the Court distinguished Native Hawaiians from American Indians, it implied that there are constitutional limitations on Congress' power over Indian tribes.

> Hawaii would extend the limited exception of *Mancari* to a new and larger dimension. The State contends that "one of the very purposes of OHA—and the challenged voting provision is—to afford Hawaiians a measure of self-governance," and so it fits the model of *Mancari*. It does not follow from *Mancari*, however, that Congress may authorize a State to establish a voting scheme that

> limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.

*Rice*, 528 U.S. at 520.

Thus, even if the Court had analyzed the provision as a tribal preference, it would still have failed as a violation of the Fifteenth Amendment. If the Fifteenth Amendment may limit Congress' constitutional power to regulate commerce with tribes, then other constitutional provisions probably also apply, including the equal protection component of the Fifth Amendment. *See* Gould, *supra,* at 740. *But see* Goldberg, *American Indians and Preferential Treatment*, 49 UCLA L. Rev. at 967-68 (arguing that preferences for Native Americans may be prohibited under the Fifteenth Amendment, but such preferences are permitted under the equal protection component of the Fifth Amendment because the latter is less specific about racial classifications than the former).

It is unclear whether *Mancari* is limited to preferences for tribes or tribal members. If *Mancari* permits "racial" preferences, then its viability is certainly in jeopardy after this Court's decision in *Adarand*. Now that Congress is considering increasing the number of federally recognized tribes, as well as the preferences benefitting these tribes, it is likely that the number of equal protection challenges to these preferences will increase. In order to avoid more conflicting decisions in the federal courts, it is imperative that this Court announce the correct standard of review for these constitutional challenges.

## II

## THE DISTRICT OF COLUMBIA CIRCUIT'S APPLICATION OF *MANCARI* CONFLICTS WITH DECISIONS OF THE NINTH CIRCUIT

The District of Columbia Circuit and the Ninth Circuit directly conflict in their application of *Mancari* when the racial

classification at issue is aimed at assisting Indians economically, rather than furthering some uniquely Indian interest such as self-government. While the District of Columbia Circuit Court has applied *Mancari* to economic preferences unrelated to unique Indian interests, the Ninth Circuit has held that *Mancari* does not apply to such preferences.

In *Williams v. Babbitt*, 115 F.3d 657, the Ninth Circuit refused to uphold an interpretation of the Reindeer Industry Act which limited the sale of Alaskan reindeer to nonnatives. Characterizing the limitation as a "naked preference for Indians unrelated to unique Indian concerns," the court held that *Mancari* did not apply. The court held that preferences for Native Americans should not be analyzed under *Mancari* unless the "[l]egislation that relates to Indian land, tribal status, self-government or culture . . . [and is therefore] 'rooted in the unique status of Indians as "a separate people" with their own political institutions.'" 115 F.3d at 664 (quoting *United States v. Antelope*, 430 U.S. 641 (1977)). The court was quick to note that while *Mancari* cited several cases as examples of permissible "special treatment" for Indians, each of the cases dealt with regulating activities in the immediate vicinity of Indian land. *Id.* at 664-65 (citing *Morton v. Mancari*, 417 U.S. 535, 555 (1974)).

Finding that the preference was not designed to promote any unique Indian interest because its only effect was to benefit Native Americans economically, the court refused to apply *Mancari*'s rational basis test. Rather, the court determined that strict scrutiny should apply, noting that after *Adarand*, "*Mancari's* days are numbered." *Williams*, 113 F.3d at 665.

The Ninth Circuit expressly stated that the classification would fail under *Adarand* for lack of narrow tailoring.

> Assuming that Congress has a compelling interest in assisting natives economically, the [Interior Board of

> Indian Appeals'] interpretation precludes any chance of defending the Reindeer Act as narrowly tailored to serve that interest. A complete race-based ban is the broadest possible remedy. Unlike a subsidy, set-aside or even a quota, an absolute ban deprives the disfavored racial group of all opportunity to participate thus placing a tremendous burden on innocent third parties. This makes the remedy almost by definition not narrowly tailored.

*Id.* at 665-66.

Even though the court ultimately avoided the "difficult constitutional questions," posed by the case and adopted instead a "less constitutionally troubling construction" of the Act, *Williams* shows the court's intent to apply strict scrutiny to classifications unrelated to unique Indian interests. *Id.* at 666.

In *Dawavandewa*, the Ninth Circuit refused to extend *Mancari* to another preference that was not linked to unique tribal interests. The court analyzed whether the Navajo tribe could require employers located on their land to give employment preferences to members of the Navajo tribe over members of other tribes. The appellate court confined the *Mancari* rational basis test to issues of tribal self-governance and noted that "[p]referential employment of Navajo Indians on a privately owned facility, while certainly helpful to the tribe's employment problems, has little to do with increasing the tribe's capacity for self-governance." *Dawavandewa*, 154 F.3d at 1123.

District court opinions from courts within the Ninth Circuit also demonstrate a judicial trend towards limiting *Mancari* to preferences involving tribal self government. These courts have applied *Adarand*'s strict scrutiny analysis in evaluating equal protection challenges to government preferences, where the preference is unrelated to a unique Indian interest. For example, in *Tafoya v. City of Albuquerque*,

751 F. Supp. 1527 (D.N.M. 1990), a district court in the Ninth Circuit found that a licensing ordinance limiting the sale of goods to New Mexico residents who were members of the Navajo Nation or of a federally recognized Indian tribe, was unconstitutional on state and federal equal protection grounds. The ordinance was designed to "preserve, protect and promote the educational, cultural and artistic interest" and the city contended that the preference was constitutionally permissible under *Mancari*. The court disagreed, holding that the city had "no particularized interest in furthering Indian interests [which were] comparable to that of the Bureau of Indian Affairs, an agency created by the United States Congress to advance its constitutional rights with respect to Indians." 751 F. Supp at 1530. Applying strict scrutiny to the racial classification, the court found the ordinance unconstitutional.

In another district court case, the court refused to extend *Mancari* to permit borough preferences in hiring for members of federally recognized tribes. *Malabed v. North Slope Borough*, 42 F. Supp. 2d. 927, 937 (D. Alaska 1999). Citing to *Williams*, the district court noted that

> [t]he Ninth Circuit interprets *Mancari* "as shielding only those statutes that affect uniquely Indian interests." This interpretation is consistent with long-recognized principles. [The Borough] employment preference is in no way related to Native land or tribal or cultural affairs. Public employment with [the Borough] is not part of some uniquely Indian interest, or time-honored, tribal tradition. *Mancari*'s rationale would seem inapplicable here.

*Id.* at 937-38. Citing to *Williams*, the district court held that *Mancari* does not apply to preferences unrelated to unique Indian interests, regardless of whether the preference is characterized as political rather than racial. *Id.* at 938. The district court evaluated the hiring preference under *Adarand*'s

strict scrutiny test and found that the preference was not narrowly tailored to further any compelling state interest. *Id.*

On appeal, the Ninth Circuit found that the *Malabed* hiring preference violated the Equal Protection Clause of the Alaska Constitution and, therefore, the court did not reach the federal constitutional claims. *Malabed v. North Slope Borough*, 335 F.3d 864, 867 n.2 (9th Cir. 2003). The appellate court did note, however, that *Mancari*'s reach is limited.

> Relying on *Morton v. Mancari*, the Borough argues that statutes enacted for the benefit of tribal members do not violate *any* federal or state antidiscrimination law . . . . This argument puts more weight on *Mancari* than it can bear. *Mancari* held only that when Congress acts to fulfill its unique trust responsibilities towards Indian tribe, such legislation is not based on a suspect classification.

335 F.3d at 868 n.5 (citation omitted).

Decisions of district courts within the Ninth Circuit and the opinions of the appellate court itself illustrate a reluctance to extend *Mancari* to government preferences aimed solely at benefitting tribes economically. This interpretation of *Mancari* directly conflicts with the lower court's decision in this case. The District of Columbia Circuit Court upheld the section 8014 racial classification because it served the "important federal interest" of "tribal economic development." *American Federation of Government Employees*, 330 F.3d at 522. But the Ninth Circuit decisions hold that economic development is not a unique Indian interest and, therefore, classifications based on this premise are not exempted from heightened scrutiny.

Given this conflict, the appropriate constitutional standard of review is unclear. In order to avoid further conflict in the federal courts, it is crucial that this Court announce the correct standard of review for constitutional challenges to government preferences benefitting Native Americans.

## CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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